

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA10-388

WENDY K. GIBSON

APPELLANT

V.

BRIAN T. GIBSON

APPELLEE

Opinion Delivered November 3, 2010

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CR-2009-1147-6]

HONORABLE R. DOUGLAS
SCHRANTZ, JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

Wendy and Brian Gibson were married in May 2007. In July 2009, Wendy filed for divorce and Brian counterclaimed. The couple had two children during the marriage—twins who were two years old at the time of the divorce hearing. Both parents requested custody of the minor children. After hearing the testimony of both parties and the maternal and paternal grandmothers, the trial court entered a decree of divorce, awarded custody of the children to Brian, and granted liberal visitation to Wendy. Wendy appeals the trial court's order awarding Brian custody of the parties' minor children. She contends that the trial court's decision ignored important evidence, was based on incorrect findings of fact, and was clearly erroneous.

We review child-custody cases *de novo*, but we will not reverse a circuit court's findings unless they are clearly erroneous. *Ross v. Ross*, 2010 Ark. App. 497. A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002). 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. *Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007). There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children. *Bailey v. Bailey*, 97 Ark. App. 96, 244 S.W.3d 712 (2006). The primary consideration in child-custody cases is the welfare and best interests of the child involved; all other considerations are secondary. *Hicks v. Cook*, 103 Ark. App. 207, 288 S.W.3d 244 (2008).

The trial court in this case made the following findings with respect to child custody:

- a. That after the parties separated, the Plaintiff did little to improve herself and only made a couple of inquiries in looking for employment.
- b. That it was the "family plan" for the Plaintiff to go back to work, and that the Defendant's parents came here to the state of Arkansas to provide child care in furtherance of that plan. However, Plaintiff did nothing to carry out this plan.
- c. That Plaintiff announced she would be moving to Tucson, Arizona, to be near family, however Plaintiff had no job, none was produced, and no indication of a job.

- d. That the Plaintiff stated that she would stay here in the state of Arkansas and not move if the Defendant was awarded custody.
- e. That the Court finds that the parties suffered financial stress, and that a serious effort was made by Defendant to make up for his job loss, but the Plaintiff did not contribute to the marital unit financially, and was unemployed since the birth of the minor children, including through the time of separation.
- f. That the Defendant, after being laid off from his employment with Wal-Mart in February 2009, set up a business and created substantial debt to set up a freelance photography business, which has produced him work, and his primary client is with Wal-Mart, and therefore, it is not plausible for him to relocate from Benton County, Arkansas.
- g. That Benton County, Arkansas is the birthplace of the minor children and they have lived here all of their young lives.
- h. That the Plaintiff has said she wanted the Defendant to participate in the children's lives, but the Court found it concerning that when the Defendant stayed home with the minor children after being laid off, that the Plaintiff found the children were getting "too attached" to the Defendant and that he needed to "make himself absent from the home." The Defendant complied with this request and would come back later in the day.
- i. That the court further found concerning that after the parties had separated, the Plaintiff would not let Defendant in the van to see the minor children when they were attending a doctor appointment on behalf of the children, nor would she allow the Defendant to trick or treat with the minor children, on a day that they had previously agreed to do so together.
- j. Further, the Court finds that her move to Tucson, Arizona would create separation from the father, which would be very hard on the minor children, if not devastating.
- k. That the Court further finds that this relocation to Tucson, Arizona has no real reason for the relocation expressed. The polestar factor to determine custody regarding the minor children is with regard to the best interest of the minor children, and the Court finds that the most significant factor is if a custodial parent is willing to share the minor children and it be meaningful, and allow setting aside of animosity, and allow meaningful long term relationship

between the non-custodial parent and the minor children. Further, the custodial parent is responsible for communication with the non-custodial parent, and for allowing participation with the non-custodial parent and the minor children.

1. Based on these findings of fact, the Court finds that it is in the best interest of the minor children that the custody be vested in the Defendant, Brian Gibson, subject to the Plaintiff's reasonable and liberal visitation, which at a minimum should be in accordance with this Court's standard visitation schedule, which is adopted herein as though set forth word for word.

Here, the trial court was obviously concerned that Wendy was requesting custody of the children without any plan as to how she would financially support them. At the time of the hearing, Wendy was currently unemployed, and did not have any prospect of employment either in Northwest Arkansas or in Tucson, Arizona, where she wished to relocate.

The trial court's award of custody was not, as suggested by appellant, a punishment for her decision to stay at home with her children—a laudable decision under most circumstances; rather, the trial court's award merely reflected its concern that, if awarded custody, Wendy was not prepared to financially support her children and had failed to demonstrate a pressing need to do so. This finding was further supported by Wendy's testimony at the hearing that the extent of her future plans was to relocate with the children to Tucson, Arizona, where she intended to live with her mother until she found other housing, and where her mother would, at least initially, provide for her financially while she began her search for employment. She admitted that she did not know whether she would be able to get a job in Arizona and had not even attempted to find a job there.

The court also found that Wendy's proposed move to Tucson would create separation from Brian, which would be very hard on, if not devastating to, the children. Because Brian had incurred substantial debt setting up his business in Northwest Arkansas and, because his primary client, Wal-Mart, is based in Northwest Arkansas, it would not be plausible for him to relocate to Tucson to be nearer to the children. Although Wendy testified that she would do everything possible to promote the children's relationship with Brian, she did not provide any plan as to how visitation would be effectuated over such a long distance—i.e., who would do the traveling and who would bear the expenses of the trip. And the court was further concerned about Wendy's ability to overcome her animosity toward Brian and allow Brian meaningful contact with the children given the fact that she had limited his contact with them on previous occasions when she was upset with him.

Brian, on the other hand, actively looked for employment after being laid off from his job at Wal-Mart. He started his own business and actively recruited and pursued clients. He currently has an income, and he detailed to the court how he would care for the children in the event he had to travel out of town for work. And, as Wendy stated that she would remain in Northwest Arkansas if Brian was granted custody of the children and as there is no impediment to her doing so, this arrangement would allow the children to maintain a meaningful relationship with both parents.

Wendy also claims that the trial court failed to consider that Brian's mother will not be able to care for the children long-term because of her health issues and that Brian's job

will require him to travel often with the children, thereby denying them a stable environment. However, Brian's mother testified that, while she and her husband had some health issues, those issues would not prevent her from taking care of the children. If at some future time this does become an issue, Wendy can petition for modification assuming she can prove that the alternative arrangements secured by Brian are not in the best interests of the children. As for the significance of Brian's travel, Brian testified that he did not intend to travel once the children were in school and that he planned to hire another photographer to travel for him. Moreover, the divorce decree stated that, if Brian had an activity which required him to be away from the children for more than (4) hours and would require child care from some other person, be it a family member or some third party, Wendy would have the first opportunity to have the children with her.

Wendy next argues that the trial court did not take into account Brian's temper when awarding custody. While Wendy testified to several instances in which Brian lost his temper, she also testified that he is a good father and she did not believe that he would hurt the children when they were in his care. Wendy's other disagreements with the court's findings fall within the trial court's province to make credibility determinations. It is not our role but that of the trial judge to evaluate the witnesses, their testimony, and the children's best interests.

The facts in this case make it a difficult one. Both parties are clearly good parents who love their children, and either is capable of being the primary caregiver. Even if we might

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have decided this case differently, based on this record, the trial court's decision awarding custody to Brian is not clearly erroneous. Accordingly, we affirm the trial court's order.

HENRY and BROWN, JJ., agree.