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ARKANSAS COURT OF APPEALS

DIVISION III

No. CV-21-204

ANDREW HAMERLINCK APPELLANT	Opinion Delivered February 23, 2022
	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. 26DR-18-908]
V.	
	HONORABLE WADE NARAMORE, JUDGE
DANIELLE HAMERLINCK APPELLEE	AFFIRMED IN PART; DISMISSED WITHOUT PREJUDICE IN PART

PHILLIP T. WHITEAKER, Judge

Appellant Andrew Hamerlinck appeals a decree entered by the Garland County Circuit Court that dissolved the marriage between him and appellee Danielle Hamerlinck; granted the parties joint custody of their children; ordered the marital home sold and the proceeds evenly divided; and adjudicated other financial issues. On appeal, Andrew challenges the court's custody, property, and financial determinations. We affirm in part and dismiss in part.

I. *Factual and Procedural Background*

Danielle and Andrew were married in 2010 and have two children, D.H. and T.H. The couple separated in 2018 when Danielle filed a complaint for separate maintenance. At the time of their separation, they had acquired property interests, including interests in

financial accounts, the marital home, and certain business assets. Andrew responded to the complaint for separate maintenance and filed a counterclaim for divorce.

Over the course of twenty-five months, the parties engaged in contentious and aggressive litigation,[1] resulting in several orders pertaining to custody and visitation. In connection with his counterclaim, Andrew sought an emergency ex parte order granting him temporary custody of both boys, citing Danielle's instability and issues with alcohol. In November 2018, the circuit court issued its initial temporary order granting custody of the children to Andrew. The court, however, awarded Danielle visitation every other weekend subject to certain conditions, including that she refrain from consuming alcohol,[2] submit to an alcohol screening before each visitation, and submit to an alcohol assessment as soon as possible.

Less than a month after the initial temporary order, the court entered its first amended temporary order in December 2018. In this order, the court continued temporary custody with Andrew but amended its previous requirement for Danielle to report for regular alcohol testing.[3] The court did, however, grant Andrew the right to request random alcohol tests from Danielle and ordered that a positive test would result in an immediate suspension

[1]The original complaint was filed in October 2018, and the decree was entered in November 2020.

[2]The court directed that neither party was to consume alcohol in the presence of the children.

[3]Danielle submitted to the court-ordered alcohol assessment, which indicated that Danielle did not meet the criteria for substance abuse.

of visitation. The court also granted Andrew the exclusive use and possession of the parties' home and made findings regarding child support and temporary spousal support.[4]

On the basis of this first amended temporary order, Andrew requested that Danielle submit to an alcohol-screening test in January 2019; when Danielle did not show up for the test, Andrew filed a "notice of test failure" and unilaterally suspended her visitation. As a result, during the spring and summer of 2019, Danielle did not have visitation with the children.

While Danielle's visitation was suspended, Andrew filed multiple motions for contempt and sanctions concerning her failure to respond to discovery and her removal of items of personal property from the marital home. In July 2019, the court held a hearing on Andrew's multiple motions. Danielle testified, admitting that she did not show up for the random alcohol screening because she knew she would test positive. She reported that since that time, however, she had stayed over a month in a Florida rehab facility and was attending Celebrate Recovery and AA when she could. Danielle further testified that through her therapy and rehabilitation efforts, she had come to understand that Andrew's manipulative demeanor throughout their marriage was the root cause of her behavior. She conceded, however, that she had been drinking frequently despite the court's earlier orders. On August 19, 2019, the court entered an order finding Danielle in willful contempt concerning the issues relating to property, but the order did not address custody or visitation.

[4]In a separate order, the court appointed an attorney ad litem for the children.

Three days after the entry of the August 2019 order, Danielle filed a motion for visitation, contending that she and Andrew were unable to agree with regard to her contact with the children. Andrew responded that he did not believe it would be in the children's best interest to have any visitation with Danielle without specific conditions to ensure their safety because Danielle had "not shown a sincere commitment to stopping the consumption of alcohol." The court apparently took no action on Danielle's request for visitation.

In October 2019, Andrew again sought emergency ex parte relief. He filed a motion alleging that Danielle "appeared" at D.T.'s school despite not having visitation rights. Andrew asserted that Danielle's behavior was disruptive and her "presence was upsetting to the children." In addition, Andrew alleged that Danielle had been involved in a single-vehicle car accident in September 2019 and had been cited for DWI and careless driving as a result of the crash. By agreement of the parties, the court entered an order requiring Danielle to stay 500 feet from the boys' schools, the boys, and Andrew pending further orders of the court.

The parties proceeded to a final divorce hearing in December 2019. The court was presented with testimony and evidence that focused primarily on the parties' behavior: Danielle's drinking and Andrew's lack of cooperation.

The evidence concerning Danielle's behavior came primarily from Danielle.[5] She testified that between October 2018 and January 2019, she had practiced sobriety because

[5]Andrew did present testimony from two witnesses who both testified about Danielle's attempts to see T.H. on school grounds. While both of these witnesses reported that the attempts were disturbing to T.H., neither reported any indication or suspicion that Danielle was under the influence. In fact, one witness described Danielle's contact with T.H. as a normal interaction between a parent and child.

the court had ordered her not to drink, and she wanted to make sure she could see her children. She admitted that she started drinking again after January and that she skipped the February 2019 test because she knew she would test positive.

Danielle also acknowledged having alcohol-related encounters with law enforcement. In September 2019, she had a car wreck after which she was charged with driving while intoxicated and careless and prohibited driving. She further admitted that her medical records after the accident showed positive tests for benzodiazepine and MDMA.[6] She also conceded that she had been arrested for public intoxication in October 2019 and spent the night in jail. The next day, she stopped by a liquor store to purchase alcohol. Later that same day, her neighbors called the police to her apartment because she was hallucinating. Danielle was taken to the hospital where she tested positive for benzodiazepine and alcohol. Despite these admissions, she denied having an alcohol problem, but she reported recently starting some "intense therapy" that seemed to be helping her control her drinking.

The evidence concerning Andrew's lack of cooperation came from both Danielle and Andrew. Danielle accused Andrew of being manipulative and controlling. She felt that Andrew would demand a random alcohol test as a means of controlling her. She stated that he texted her regularly demanding that she submit to an alcohol test and that he manipulated her into going to rehab because she felt it was the only way she would be allowed to see her children. Even though she went, he still refused her visitation. Danielle admitted that

[6]Danielle explained that she had a prescription for the benzodiazepine and took it to help control her urge to drink.

she had not had visitation with her boys since the previous July and had only sporadic contact with them over the phone. She said she had asked Andrew to speak to the boys at least twenty-five times in the last month, but Andrew always had excuses for why they were unavailable.

Testifying in his own behalf, Andrew explained that when Danielle did not show up for the February alcohol test, he discontinued her visitations. He also admitted that he had not agreed to visitation between Danielle and the children without a court order because he felt it was his duty to protect the boys. He denied that Danielle had frequently attempted to contact the boys, specifically denying her claim that she had texted twenty-five times in the last month asking to see the children. He also denied her accusation that he regularly texted her demanding that she test for alcohol. He claimed that he had initially allowed phone contact via Facetime but admitted that he terminated this contact when it got "completely out of control." He felt that she was frequently intoxicated when she called, and the boys were not excited to talk to her. He admitted that the only affirmative step he had taken to encourage contact between Danielle and the children was offering Facetime visits, over which he exercised complete discretion.

Concerning visitation, Andrew contended that he could be trusted with having the authority to decide when Danielle would be able to contact the children outside of a court order. He agreed, however, that each time she had asked for more visitation with the boys, he had told her that the court would have to make that decision. Overall, Andrew expressed his desire that the court not allow her any visitation at all. Andrew expressed concern with Danielle's having even supervised visitation because he did not know whether she was using

pills or alcohol. In fact, he said that he believed there were no circumstances under which he would deem it appropriate for Danielle to see the children and felt that there was nothing Danielle could do to normalize things between them with respect to the children. He admitted, however, to a willingness to permit supervised visitation at a neutral site.

After taking this evidence, the court was unable to finish the hearing because of time constraints. The children's ad litem stated his belief that Danielle should have supervised visitation with the children in the interim. The court then entered its second amended temporary order finding it would be in the children's best interest to have visitation with Danielle on a temporary basis. The court ordered that Danielle was not to drive the children anywhere and that the visitation would be supervised by Change Point Pregnancy Care and Parenting Resource Center. The court also directed that the duration and location of Danielle's visitation could be altered as recommended by Change Point after review and approval of the ad litem. In addition, the order provided that Danielle was to be able to contact the children via Facetime three days a week.

Before the second part of the hearing reconvened, both parties filed competing motions for contempt: Andrew's motion was based on Danielle's presence at a baseball game and her coming by Andrew's house with food for the children; and Danielle's motion alleged that Andrew was refusing to follow the recommendations of the visitation supervisor from Change Point that the children be allowed to visit Danielle in her home.

The court reconvened the hearing in July 2020 with the evidence again primarily focusing on the parties' behavior. Concerning Danielle's drinking, Danielle testified that her public-intoxication charge from October 2019 had been dismissed after her successful

completion of probation in June 2020. She acknowledged that her behavior during the collapse of her marriage had been "out of character" but expressed hope that the court could see a change in her demeanor. She stated that she had engaged in "a lot of self-development," including taking a domestic-violence class, that she was keeping in close contact with individuals who were helping with her recovery, and that she was generally stronger and happier than she had been previously. Since the last hearing, she admitted that she still drinks alcohol "maybe three to four times a week" but only with other people. She acknowledged that she was not "100 percent better because I do drink on occasion socially" but agreed that the children do not need to be around it. When asked by the ad litem what would keep her from drinking while she had the boys, she replied, "I haven't had my children in eighteen months and I think that's motivation enough." She further reported her willingness to take a breathalyzer test at her expense before and during her time with her children.

In addition to Danielle's testimony, the court heard testimony from Joann Carter, the visitation supervisor from Change Point. Carter confirmed Danielle's efforts at training. Carter felt that the domestic-violence class Danielle had been attending had given her strength and confidence to deal with her relationships with other people and added that Danielle had developed a more positive approach to things and was not so "emotionally down." She further stated that Danielle's visits with the boys had gone well from the beginning, and there had been no sense of hesitancy between them.

Concerning Andrew's behavior, Danielle said that Andrew stopped her visitation with the boys on March 12, without explanation, despite the fact that the supervised

visitations with Change Point had been going well. She said that when she tried to call the children, Andrew would tell her that they didn't want to talk to her. Carter also testified concerning Andrew's behavior. Around the fifth visitation between Danielle and the boys, Carter began to feel that it was appropriate for the boys to have a visit at Danielle's house. The ad litem agreed with her, but when she spoke to Andrew about it in late February, he pointedly told her that it "wasn't going to happen" and provided no reason for his refusal. Finally, in his testimony, Andrew continued to express concerns about Danielle's drinking and instability. When he was asked what it would take for him to feel comfortable with the children being around Danielle unsupervised, he replied that he did not know what it would take for her to change and said he felt that she still was not making the best decisions.

At the conclusion of the hearing, the court took the matter under advisement and asked both sides to submit proposed findings of fact regarding custody, visitation, and financial issues. The ad litem recommended that custody should remain with Andrew, subject to Danielle's supervised visitation. In the interim, the court entered its third amended temporary order adopting the ad litem's recommendation that Andrew keep custody but allowed Danielle to continue to have visitation under Carter's supervision in Danielle's home. In addition, the court found that Carter's supervision would taper off over time.

In November 2020, the court entered its final decree of divorce. In the decree, the court decided issues of property allocation, including the division of the marital home and certain financial accounts. Regarding custody, the court awarded joint legal and physical custody, established a visitation schedule, forbade both parties from consuming illegal drugs, ordered Danielle to not consume alcohol during her visitation times with the children for a

period of six months, and ordered her to enroll in a verifiable alcohol-testing service for the same time period.

Andrew filed a timely motion for reconsideration and new trial that was deemed denied thirty days later. Andrew then filed a timely notice of appeal.

II. *Issues on Appeal and Finality*

Andrew raises four arguments for reversal. First, he argues that the circuit court erred in awarding joint custody of the parties' children. Second, he challenges the court's distribution of funds in certain financial accounts. Third, he claims that the court erred in awarding Danielle a 50 percent interest in the marital home. And finally, Andrew complains that the court erred in not awarding him any of the value of Danielle's business.

Apart from the custody issues, however, we are unable to address Andrew's arguments because the divorce decree is not a final, appealable order. Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure–Civil provides that an appeal may be taken from a final judgment or decree that is entered by a circuit court. "For a [decree] to be final and appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy." *Davis v. Davis*, 2016 Ark. 64, at 5, 487 S.W.3d 803, 807. It must also "put the court's directive into execution, ending the litigation or a separable part of it." *Id.*, 487 S.W.3d at 807. The question whether an order is final and appealable is jurisdictional, and this court is obligated to consider the issue on its own even if the parties do not raise it. *Price v. Carver*, 2017 Ark. App. 75, at 2, 513 S.W.3d 877, 879. The purpose of the finality rule is to avoid piecemeal litigation. *See Roach v. Roach*, 2019 Ark. App. 34, at 5, 571 S.W.3d 487, 490.

Between the December 2019 hearing and the entry of the final divorce decree, both parties filed multiple motions for contempt and for sanctions. On March 13, 2020, Andrew filed a motion for contempt regarding Danielle's attempts to see the children at a baseball game. On March 23, he filed an amended motion for contempt and for sanctions, adding claims that Danielle had been attempting to contact the boys at his house. Danielle filed a motion for Andrew to show cause, citing Andrew's refusal to allow the children to visit in her home. And on September 21, Andrew filed an emergency ex parte motion for control of D.T.'s bank account, for an order to return funds, and for a show-cause order, arguing that Danielle should be held in contempt for withdrawing money from D.T.'s bank account. The circuit court's divorce decree, however, did not address or resolve any of these contempt motions.

We recently addressed a similar situation in *Williams v. Williams*, 2020 Ark. App. 204, 599 S.W.3d 137. In *Williams*, the court entered a divorce decree that awarded custody and divided property, but it omitted mention of several pending contempt petitions. We affirmed the circuit court's decision regarding child custody; however, we dismissed the remaining issues for lack of a final order. Specifically, we noted that "because '[c]ontempt is not merely a collateral issue, like attorney's fees,' a circuit court's order is not final and appealable when contempt issues remain pending." *Id.* at 14, 599 S.W.3d at 145 (quoting *Roach*, *supra*).

Because contempt issues remain pending in this case as well, we lack a final order as to all issues other than custody. Accordingly, we dismiss without prejudice Andrew's challenges to the circuit court's decisions regarding the division of the marital assets. We

now turn our attention to the court's decision to award joint custody of the children to Andrew and Danielle.

III. *Custody*

We perform a de novo review of child-custody matters, but we will not reverse the circuit court's findings unless they are clearly erroneous. *Grimsley v. Drewyor*, 2019 Ark. App. 218, at 8, 575 S.W.3d 636, 641. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*, 575 S.W.3d at 641.

Andrew contends that the circuit court erred when it granted joint custody of the children to the parties. In its decree, the court found that shared "joint legal and physical custody" was "in the best interest of the children." Our legislature has determined that an award of joint custody is favored in divorce cases. Ark. Code Ann. § 9-13-101(a)(1)(A)(iii) (Repl. 2015).[7] When in the child's best interest, custody should be awarded in such a way as to ensure the frequent and continuing contact of the child with both parents. *Grimsley*, 2019 Ark. App. 218, at 8, 575 S.W.3d at 641. Moreover, the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Id.* at 8, 575 S.W.3d at 641.

In reaching its best-interest conclusions, the court made extensive findings:

> With regard to the issue of child custody and visitation, the Court specifically finds by a preponderance of evidence that Plaintiff has faced issues related to alcohol abuse over the two-year span of this case and has produced credible evidence of some

[7]This statute was amended by Act 604 of 2021 to create a rebuttable presumption that an award of joint custody is in the best interest of the child. This version of the statute, however, was not in effect when the circuit court entered the divorce decree herein and is therefore irrelevant.

limited rehabilitation. Plaintiff continues to minimize her consumption of alcohol/alcoholism and has demonstrated a lack of awareness regarding her addiction to the same. However, Plaintiff's visits with the children have gone well and no objections have been raised to the visitations or Plaintiff's conduct therein by any supervising authority. The visitation supervisor requested that the Plaintiff have increased access to the children and has made home checks.

Defendant has consistently testified that his desire is to limit Plaintiff's contact with the children to zero, if possible. Upon question of the Court, Defendant stated that he would never trust any circumstance where Plaintiff and her children interact. Defendant's attitude is consistent with his stated position that Plaintiff should not be entitled to any asset accumulated during the marriage and that his preference would be to leave her with nothing, be it material possessions or contact with her children. Defendant's conduct has been confrontational and defiant with the visitation supervisor. He has continually restricted access to the children without justifiable cause, or in a reasonable manner. He acts unilaterally to limit the mother's contact, without the authorization of the court, and to the detriment of his children. There were less restrictive alternatives and methods available to him to ensure his children had reasonable and safe contact with their mother, but he chose to deprive them of that contact entirely.

The father has not demonstrated the willingness or ability to set aside his dislike for the mother such that he can make decisions that are in his children's best interests. However, the mother has also not demonstrated the willingness or ability to stop consuming alcohol to excess, also contrary to her children's best interests.

The Court has a responsibility to examine the best interests of the children and enter orders that promote frequent and continuing contact of the child with both parents. The Court has a statutory duty to prefer a joint custody arrangement between parents, subject to their best interests.

Defendant has consistently thwarted visitation and frequent, continued contact between Plaintiff and her children. The Court finds that Defendant's interference and refusal to provide and promote contact between mother and her children is not in the best interests of the children. Plaintiff's continued consumption of alcohol and minimizing of her alcoholism is also not in the minor children's best interests. However, Plaintiff has made progress in relation to that issue and provided proof of sufficient control of her alcoholism to the Court that joint legal custody between Plaintiff and Defendant is appropriate and necessary under the facts and circumstances of this case, and in the best interests of the children. The Court can see no other way to ensure that Plaintiff is a continuing part of her children's lives than to award joint legal and physical custody to the parties.

In his brief, Andrew recounts in depth the testimony offered at each of the hearings; he challenges the circuit court's findings that he was confrontational with the visitation supervisor and that he thwarted visitation and contact between Danielle and the boys; and he complains that the circuit court ignored the recommendation of the ad litem concerning joint custody. In essence, Andrew argues that the circuit court "erred in balancing out the alleged actions of [Andrew] in not promoting visitation with the extreme alcoholism and lack of insight demonstrated by [Danielle]."

We conclude that Andrew's argument is nothing more than a request that we reweigh the evidence and evaluate it differently than did the circuit court. This is something we will not do. *See Williams v. Williams*, 2019 Ark. App. 186, at 19, 575 S.W.3d 156, 166; *Wilhelm v. Wilhelm*, 2018 Ark. App. 47, at 6, 539 S.W.3d 619, 624. Rather than reweigh the evidence, however, we give special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the children's best interest. *Cunningham v. Cunningham*, 2019 Ark. App. 416, at 4, 588 S.W.3d 38, 40.

In this case, the court was able to observe the parties over multiple hearings. Clearly, the court gave deep and thoughtful consideration to the facts and arguments presented by the parties regarding best interest. The court entered written findings reflecting its struggle with how best to resolve the best-interest question before it, given its serious concerns with both Danielle's alcohol-related issues and Andrew's control issues and inflexibility. As we stated in *Cunningham*, "Each child-custody determination ultimately must rest on its own facts [and on] this record, it is clear that the circuit court carefully considered all the evidence presented." *Cunningham*, 2019 Ark. App. 416, at 8, 588 S.W.3d at 42. The facts presented

in this appeal are a classic example of why this court defers to "the superior position of the circuit court to evaluate the witnesses, their testimony, and the children's best interest." *Id.* at 9, 588 S.W.3d at 43.

Because we will not reweigh the evidence differently than the circuit court regarding the propriety of joint custody, *see Grimsley*, *supra*, we are not left with the definite and firm conviction that a mistake has been made. As such, we affirm the circuit court's decision to award joint custody. And as noted above, we dismiss Andrew's remaining arguments without prejudice.

Affirmed in part; dismissed without prejudice in part.

HIXSON and MURPHY, JJ., agree.

Green & Gillespie, by: *Chad M. Green*, for appellant.

Dusti Standridge, for appellee.