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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CV-21-273

SARAH SMITH

APPELLANT

V.

JOSHUA HEMBREE

APPELLEE

Opinion Delivered March 9, 2022

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. 23DR-20-233]

HONORABLE SUSAN WEAVER,
JUDGE

AFFIRMED

STEPHANIE POTTER BARRETT, Judge

Appellant Sarah Smith appeals the Faulkner County Circuit Court’s order awarding primary custody of the parties’ son, J.M.H., to appellee , Joshua Hembree. Sarah argues on appeal that the circuit court clearly erred by not awarding joint custody. We affirm.

Sarah and Josh were involved in a brief long-distance relationship in 2018 that resulted in the birth of J.M.H. on August 27, 2019. Sarah resides in Conway, Arkansas, and Josh resides in Oxford, Mississippi. After the birth of J.M.H., the parties continued their relationship and attempted to raise him together. However, this arrangement was short lived. On December 28, 2019, Sarah and Josh got into an altercation while visiting Josh’s family in Daphne, Alabama, which resulted in Sarah’s returning to Conway with J.M.H.

On March 6, 2020, Josh filed a petition for the establishment of paternity, custody, visitation, and support in the Faulkner County Circuit Court. In his petition, Josh alleged that he is J.M.H.’s putative father and believed he was listed as J.M.H.’s father on his birth certificate.

He alleged that he was the fit and proper person to have sole legal and physical custody of J.M.H., subject to Sarah's reasonable visitation because of (1) Sarah's refusal to allow Josh to see J.M.H. since the end of their romantic relationship and poor communication regarding his attempts to visit J.M.H.; (2) Sarah's emotional immaturity and codependent relationship with her mother; (3) the condition of Sarah's residence; (4) Sarah's displays of anger and emotional instability—throwing a baby bottle at his head while they were driving, kicking him in the groin while he was holding J.M.H., and his belief that she will make up false allegations of abuse; and (5) Sarah's lack of support regarding J.M.H.'s relationship with Josh's parents as evidenced by her refusal to allow visitation and failure to respond to pictures or Facetime calls. Sarah filed a response to Josh's petition alleging that their relationship came to a "violent end" and that she had custody of J.M.H. because Josh "hardly had a relationship with his child" given his once-a-month trips to Arkansas.

A temporary hearing was held on May 11, 2020. Josh testified that he lived in Oxford, Mississippi, and worked as a chemical-engineering consultant. He travels to Arkansas once a month for work and was able to set his own schedule. He stated he is J.M.H.'s father and had been involved in his life until the December 28 incident over Christmas at his parents' house. Josh testified that he had not seen J.M.H. since that day. According to Josh, Sarah kicked him in the groin while he was holding J.M.H. because she was angry that he did not properly wash his hands before preparing a bottle. Josh also stated that Sarah had thrown a baby bottle at him while driving on one occasion and had thrown a cell phone at him on another.

Josh said that he attempted to set up visits with J.M.H. after the December incident but that he was never allowed to see him. In January, he traveled to Conway on a mutually agreed-on date, but Sarah would not commit to a time, and he did not get to see J.M.H. He said that

he was told in February that he could not see him. Josh did not see J.M.H. in March due to the onset of the COVID-19 pandemic because he did not want to subject either Sarah or J.M.H. to possible exposure.

Sarah testified that she and Josh met at her sister's wedding in 2015 but did not begin a relationship until 2018. She stated that Josh was angry when she told him she was pregnant. She said Josh attended one physician's visit while she was pregnant and was present at J.M.H.'s birth. After J.M.H.'s birth, Josh would travel to Arkansas once a month. During this time, she and J.M.H. spent nine days in Mississippi with Josh. Unsurprisingly, Sarah's version of the events of December 28 is different than Josh's version. According to Sarah, Josh became irritated when she asked him if he had washed his hands when he got up to get J.M.H. a bottle that night. She called him a name, and he demanded she give J.M.H. to him. She said Josh was trying to get J.M.H. from her, and she kicked towards him. She said this made him really mad. He grabbed her hair and called her a "psycho bitch." Sarah handed J.M.H. to Josh and texted her mother to come pick her up.

Sarah testified that she filed a police report on December 30, 2020, in Faulkner County regarding the incident in Alabama and filed for an order of protection on January 2, 2021, which was denied and subsequently dismissed by Sarah. Sarah testified that she Facetimed Josh on January 9, 2021, and was going to let him see J.M.H. on January 11 but did not because she was still afraid of him. Sarah said that she told a coworker on January 10 that she believed Josh would try and kidnap J.M.H. Sarah informed the circuit court that she wanted sole custody of J.M.H. subject to Josh's visitation.

The circuit court ruled from the bench granting temporary joint custody to the parties until a final hearing. The circuit court noted that it had a "big problem" with Sarah's denying

Josh visitation with J.M.H. the past several months. It also noted that Sarah seemed to be “emotionally unstable” and that Josh presented the opposite of how Sarah had described him. The parties were ordered to either alternate week on/week off visitation or do a 4/3 split of the week. Each party was to have reasonable phone visitation with J.M.H. when he was in custody of the other parent. The circuit court ordered psychological evaluations for both parties. The circuit court did not award child support at this time. A temporary order with the above findings was entered on June 25. On August 25, the circuit court appointed an attorney ad litem.

Psychological evaluations conducted by Dr. Glen Adams, a licensed psychologist, were filed with the circuit court on December 11. Dr. Adams’s evaluation found Josh’s present psychological status stable and that he is able to manage most circumstances without significant emotional distress. Dr. Adams diagnosed Josh with attention deficit disorder. With regard to Sarah, Dr. Adams noted that she responded in a very defensive manner to several of the measures used in the evaluation. Dr. Adams diagnosed Sarah with “Adjustment Disorder with Anxiety and Other Specified Personality Disorder – dependent features.” Dr. Adams’s recommendation was that Sarah would benefit from therapy that addresses the pattern of dependency and how it impacts her interpersonal relationships and her parenting potential. The evaluation noted that the parties’ ability to coparent was likely poor. Dr. Adams also recommended that both parties would benefit from learning how to more effectively coparent for the benefit of J.M.H. Ms. Cynthia Moody, the attorney ad litem, filed her “Report and Recommendation of Attorney Ad Litem” with the circuit court also on December 11, which recommended joint custody until it was time for J.M.H. to attend school, and then a final custody decision should be made.

A final hearing was held on December 14. Sarah testified that her mom takes care of J.M.H. when she is at work. She stated that she wants J.M.H. to get a good preschool education before kindergarten and to attend school in Conway. She did not realize that Josh wanted J.M.H. to attend school in Oxford. Sarah testified that she has complaints about Josh's handling of a few situations. First, she was unhappy that he failed to inform her until "a week after the fact" that an eight-week-old infant had died in J.M.H.'s daycare. Also, Josh failed to tell her that J.M.H. had received two additional immunizations until nine days after he had received them. Sarah testified that Josh refused to allow her a Facetime call with J.M.H. on Father's Day but that she insists on daily Facetime calls.

Sarah admitted that Josh had given her extra time with J.M.H. on her birthday and had made accommodations so she would not have to travel during bad weather over J.M.H.'s birthday. Sarah also admitted that a child-abuse-hotline report was made around June 11 when she noticed bruises on J.M.H. the night after she picked him up from Josh's first full week of having him. She did not tell Josh that she noticed bruises but texted him that J.M.H. was running a fever. Sarah proceeded to take J.M.H. to the emergency room and did not tell Josh because she did not like how he responded to her when she told him about the fever. She also admitted that she did not tell Josh that an Arkansas Department of Human Services (DHS) investigator reached out to her after J.M.H. was seen in the emergency room because she "didn't know he needed to know that."

Sarah testified that she did not agree with some of Dr. Adams's findings in her psychological evaluation, but when asked to explain, she could only point to one instance in the report that had listed a family member's residence incorrectly. She agreed that she stopped going to individual counseling. Sarah acknowledged that Dr. Adams's report recommended

she attend individual counseling and said she hoped to look into going to therapy. Sarah informed the circuit court that she had not been flexible on schedule changes for Josh and that she had not offered any accommodations that could have encouraged or supported Josh's relationship with J.M.H. Sarah agreed with the attorney ad litem's recommendation of joint custody.

Josh testified that he was not aware that Sarah had reported him to DHS until he was contacted by a Lafayette County, Mississippi, Child Protective Services investigator. He did not learn about Sarah's taking J.M.H. to the emergency room until he read it in Sarah's psychological evaluation, just days before the final hearing. Josh testified that he did not feel valued as a coparent by Sarah, and everything seemed like a one-way street where she wants him to give but refuses to reciprocate. Josh informed the circuit court that he wants to have primary custody of J.M.H. subject to Sarah's visitation. He reiterated that he wants Sarah to be a part of J.M.H.'s life.

On January 11, 2021, the circuit court entered a final order. The court stated that while joint custody is favored under Arkansas law, the court is to consider the parties' ability to coparent as well as the welfare and best interest of the child. The court further found that it was evident from the temporary hearing, final hearing, and report of Dr. Adams that coparenting is not working between the parties.

The court also considered the parties' psychological evaluations, which recommended therapy for Sarah to address patterns of dependency and how it has impacted her interpersonal relationships and her parenting potential and was concerned that Sarah had not pursued therapy by the time of the final hearing. The court was also concerned that her anxiety could bleed over to J.M.H. over the next several years if there is no final order entered. The court found

that it would be J.M.H.'s best interest that custody be changed and awarded primary custody to Josh on an alternating basis with Josh having J.M.H. two weeks and then Sarah having him one week until J.M.H. starts preschool, when Josh would have physical custody during the week subject to Sarah's visitation every other weekend.

This appeal followed.

This court performs a de novo review in child-custody matters and will not reverse a circuit court's findings unless they are clearly erroneous. *Cunningham v. Cunningham*, 2019 Ark. App. 416, 588 S.W.3d 38. A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. *Id.* Whether a circuit court's findings are clearly erroneous turns in large part on the credibility of the witnesses, and special deference is given to the circuit court's superior position to evaluate the witnesses, their testimony, and the child's best interest. *Id.* There are no cases in which the circuit court's superior position, ability, and opportunity to observe the parties carry as great a weight as those involving minor children. *Id.* The primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Id.*

On appeal, Sarah argues that the circuit court clearly erred by awarding Josh primary custody of J.M.H. and should have awarded the parties joint legal custody as is presumed under Arkansas law to be in the child's best interest. Specifically, she argues that each parent demonstrated the ability to nurture J.M.H. and shared the blame for communication issues. Josh responds that at the time of the hearing on December 14, 2020, there was no statutory presumption that joint custody was in a child's best interest. Josh is correct. At the time of the hearing, joint custody was favored under state law, but there was no rebuttable presumption that it was in the child's best interest. *See* Ark. Code Ann. § 9-13-101(a)(1)(iii) (Repl. 2020).

Arkansas Code Annotated section 9-13-101 was amended during the 2021 Arkansas legislative session to create a rebuttable presumption that joint custody is in the best interest of the child concerning an original custody determination in a divorce or paternity matter. See Ark. Code Ann. § 9-13-101(a)(1)(A)(iv) (Supp. 2021). In addition, regardless of whether joint custody is favored, our law remains that “the mutual ability of the parties to cooperate in reaching shared decisions in manners affecting the child’s welfare is a crucial factor bearing on the propriety of an award of joint custody, and such award is reversible when cooperation between the parties is lacking.” *Hoover v. Hoover*, 2016 Ark. App. 322, at 7, 498 S.W.3d 297, 301.

Sarah argues that Arkansas case law is “still exploring what factual basis is required to find that cooperation between parents is lacking.” As support, she heavily relies on this court’s decision in *Hoover, supra*. She contends that the court found that although there was a significant level of animosity between the parties, the evidence presented showed that both parties were capable parents who love their children. *Id.* She further argues that this court’s reasoning in *Hoover* demonstrates that even when severe turmoil exists between the parties, the presumption of joint custody is not automatically overcome. We disagree.

First, as explained above, at the time of the hearing, there was no statutory presumption that joint custody was in the best interest of the child. Further, *Hoover* is distinguishable because it involved a modification of custody rather than an original determination. Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Ingle v. Dacus*, 2020 Ark. App. 490, 611 S.W.3d 714. The reason for the stringent standards for modification is to promote stability and continuity in the life of the child and to discourage repeated litigation of the same issues. *Id.* This is not the situation before this court.

Sarah also argues that the circuit court should have considered the attorney ad litem's recommendation that the parties be awarded joint custody until J.M.H. turns five, and then have the parties submit to mediation to determine which parent J.M.H. should live with once he begins school. The circuit court is not bound to follow an attorney ad litem's recommendation. *Pelayo v. Sims*, 2020 Ark. App. 258, 600 S.W.3d 114. Moreover, as mentioned previously, there are no cases in which the superior position, ability, and opportunity of the circuit court to observe the parties carries a greater weight than those involving children. *Cunningham*, 2019 Ark. App. 416, 588 S.W.3d 38.

Each child-custody determination must rest on its own facts. *Hoover*, 2016 Ark. App. 322, 498 S.W.3d 297. On this record, it is clear that the evidence introduced at the hearing supports the circuit court's findings. Sarah, on multiple occasions, showed that she does not have the ability to effectively coparent J.M.H. She admittedly failed to notify Josh that she had noticed bruises on J.M.H. after being in Josh's care and failed to notify or ever tell Josh that she took J.M.H. to the emergency room for these bruises, which resulted in a child-abuse-hotline report and a subsequent DHS investigation that Josh only learned about when he was contacted by his local child-protective-services agency. Furthermore, Sarah admittedly stopped going to individual therapy and failed to follow Dr. Adams's recommendation that she undergo therapy to address patterns of dependency and how it has impacted her interpersonal relationships and her parenting potential. Dr. Adams also noted that Sarah seemed to have little insight into her behavior and how she seeks attention and acceptance, which would likely result in her continuing to have emotionally shallow relationships and be vulnerable to those who give her significant attention.

Here, the circuit court relied, in part, on the parties' psychological evaluations, evidence of the parties' inability to cooperate and communicate, and its observations of the parties during the preceding hearings in awarding primary custody to Josh as opposed to joint custody. While the visitation award may not have been equal, the circuit court awarded Sarah additional visitation for spring breaks and summers. Given our standard of review and the deference we give circuit courts to evaluate the witnesses, their testimony and the child's best interest, we are not left with a definite and firm conviction that the circuit court made a mistake in awarding primary custody to Josh. Accordingly, we affirm.

Affirmed.

VIRDEN and GRUBER, JJ., agree.

Helen Rice Grinder, for appellant.

James, House, Swann & Downing, P.A., by: *Kayla M. Applegate*, for appellee.