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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-21-160

CRISSY SCHNICK APPELLANT V. GARY RUSSELL APPELLEE	**Opinion Delivered** May 11, 2022 APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DISTRICT [NO. 16JDR-12-102] HONORABLE CINDY THYER, JUDGE AFFIRMED

STEPHANIE POTTER BARRETT, Judge

Appellant Crissy Schnick appeals the Craighead County Circuit Court's order denying her request to relocate with the parties' minor children, V.O.R. and C.R.R., and awarding appellee, her ex-husband, Gary Russell, primary physical custody of the children. On appeal, she contends that the circuit court erroneously relied on and misapplied *Singletary v. Singletary*, 2013 Ark. 506, 431 S.W.3d 234; when *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), was the appropriate case law for this situation. We find no error and affirm the circuit court.

The parties were divorced on March 12, 2012, and were awarded "joint legal and physical custody, care, and control" of their two minor children, V.O.R. (born January 27, 2007) and C.R.R. (born December 18, 2008). On September 25, 2019, Crissy filed a petition for modification and request to relocate children wherein she sought the circuit

court's permission to relocate to Omaha, Nebraska, where she had obtained a new job. Specifically, she requested that C.R.R. be allowed to go to Omaha on December 21, 2019, and that V.O.R. be allowed to go to Omaha in May 2020 at the end of the school year, and she requested that the current custody arrangement be modified and she be named the primary custodian of the children. Gary filed an answer to Crissy's petition and a counterclaim seeking sole custody of the children.

On August 26, 2020, a hearing was held on Crissy's relocation-and-custody petition. Crissy testified that she and Gary agreed to "true joint custody" at the time of their 2012 divorce; however, that was not what had transpired since then, although they tried to keep it a 50/50 division of time "to best we could." She stated that she and Gary had always worked together for the kids until this job opportunity arose. Crissy created a calendar chart showing how many days she had spent with the children since the divorce. She testified that she believed the children spent 74 percent of their time with her in 2012, 61 percent in 2013, 58 percent in 2014, 57.8 percent in 2015, 64 percent in 2016, and 65 percent in 2017. Crissy testified that V.O.R. switched from the Walnut Ridge School District to the Valley View School District for more educational opportunities in 2017. Crissy stated that in 2018, V.O.R. primarily lived with Gary during the week, and C.R.R. primarily lived with her. They split custody evenly on the weekends and tried to keep the children together. Crissy also stated that she and Gary would try and schedule mid-week visits for the children. Crissy estimated that she had the children 66 percent of the time in 2018 but had not split this time up by child. She estimated that she had the children 57 percent of the time in 2019, even after her move to Omaha. She stated that in 2020, she had the

children about 57 percent of the time and that they had evenly shared custody. She said she was doing a lot of weekend trips to Arkansas. Crissy testified that she believed she would be able to divide her and Gary's time with the children "pretty close" to what they had been doing if she was allowed to relocate.

Crissy testified that she wanted to move to Omaha because she had a better job opportunity and that was where the family of her husband, Joel Schnick, lives. She said that she had been employed as a radiology leadership director at Lawrence County Health Systems. She said that Lawrence County had been under a wage freeze for the past four years, and she attempted to find other local employment. Crissy stated she was unable to find a position in the surrounding area of northeast Arkansas or Memphis. Her new job in Omaha was paying her two dollars an hour than her job at Lawrence County. She admitted that this was the only job application she submitted in her job search. She stated she needed a leadership position to maintain her level of pay.

Crissy testified that she had remarried in 2013 and that she and Joel had separated in 2018. They sold their home and moved into separate residences but have since reconciled. Crissy denied that her and Joel's relationship was ever really bad. Crissy explained that she moved to Omaha at the end of October in 2019, and Joel remained in her home in Walnut Ridge. She left C.R.R. in Joel's care except when it was Gary's night or weekend during this time. She tried to come home on weekends to keep things normal. Crissy admitted she had called 911 on Gary on November 4, 2019, when he attempted to pick up C.R.R. from Joel's custody, and she and Joel refused to allow Gary to take C.R.R. with him. After

this incident, Gary retained physical custody of C.R.R. and moved her to the Valley View School District after the fall semester ended.

Crissy testified that she did not believe the parties could keep up the joint-custody arrangement anymore. She stated that her and Gary's communication had been poor since he moved C.R.R. to Valley View schools. Crissy testified that she would allow V.O.R. to stay with Gary if that was what he wanted to do. She said that she and Gary had tried really hard to keep V.O.R. and C.R.R. close since they were living in separate houses and had no intention of splitting them up. Crissy said that prior to her relocation to Omaha, she and Gary had always shared personal information with each other, including her relationship issues with her current husband and other major life events.

When asked by the circuit court what exactly her plan for the children was if she was allowed to relocate, Crissy said she would utilize long weekends and one-way flights to speed up travel time, and she would be more giving with summer visitation. She believed that the children's school schedules would be different, so C.R.R. would be able to go to Arkansas and see Gary and V.O.R. and vice versa. She explained that the drive to Omaha was about nine and a half hours, so she proposed they share the costs of flying the children to and from Omaha.

V.O.R. testified that he wanted to remain in Arkansas. He said that he has a good relationship with both parents and their spouses, and that he and C.R.R. are close with their three-year-old stepsister. V.O.R. said that if C.R.R. was allowed to move to Omaha, he would want to see her as much as possible. V.O.R. concluded his testimony by saying

that his parents had always gotten along great until "this Nebraska thing" came up, but they had tried to keep the conflict away from him and C.R.R.

C.R.R. testified that she did not feel like either parent was making her choose a side and did not feel torn between the two of them. She told the circuit court that she would like to live with her mom because she was a little closer to her than her father and that she would prefer if her mom just stayed in Arkansas so she could see everyone.

Gary testified that he understood the initial divorce decree to be a true joint custody arrangement and that they would equally share the responsibilities of the children. Gary disagreed with some of Crissy's estimations of how much time each party spent with the children, specifically the 2012 estimate of 74 percent with her, and he thought 2016 would have been closer to a 57/43 split. He and his wife had a baby in February 2017, and he said he would have tried to keep the custody at 50 percent. He testified he thought 2017 would have been more of a 60/40 split for C.R.R. and 40/60 split for V.O.R. Gary said that from the fall of 2017 until Crissy left for Omaha, he would typically have V.O.R. on Sunday, Monday, Tuesday, and Thursday with Crissy having C.R.R. on those days. He would have C.R.R. on Wednesday, Friday, and Saturday, and Crissy would have V.O.R. on those days. He said they tried to split the weekends so that would each get equal time, but it was not always possible. Gary said that he has a close relationship with C.R.R.

Gary testified that when Crissy told him about the move to Omaha, he said he would not agree because it would not be feasible to keep their joint-custody arrangement due to the distance. He believed the only connection Crissy had in Omaha was that was where Joel's parents lived. He did not believe that the children could have a normal social life and

a relationship with both parents in separate states. Gary said that V.O.R. plays soccer and has tournaments every other weekend, and if C.R.R. made friends in Omaha, she would not be able to have sleepovers because she would have to go see her dad in Arkansas. He was concerned about the children spending entire days flying back and forth to Omaha and about them flying alone. Gary testified that he did not see this move benefit anyone other than Crissy, and he did not believe it was in the children's best interest for the circuit court to allow it. Gary believed the children needed to be around both parents.

The circuit court issued its ruling from the bench, and a written order was entered on December 7, 2020. In the order, the circuit court found that because of the parties' decree and their practice to share joint custody with equal time, appellant's relocation was controlled by *Singletary*, 2013 Ark. 506, 431 S.W.3d 234, not *Hollandsworth*, 353 Ark. 470, 109 S.W.3d 653.

The circuit court found that there had been a substantial change in circumstances since the entry of the decree due to Crissy's relocation to Omaha. The circuit court further found a material change of circumstances by the failure of the parties to communicate after Crissy's move to Omaha. Under the best-interest analysis, the circuit court found that the marginal benefit of Crissy's move to Omaha did not outweigh the cost to the relationships between the children and the parents if one or both of the children were permitted to move with Crissy to Omaha. Further, the circuit court felt strongly that it was not in the best interest of the children—who have enjoyed a close and loving relationship and strong bond with one another—to be apart for significant periods of time. The circuit court modified

the original decree and granted primary physical custody of both children to Gary. This timely appeal followed.

In reviewing child-custody cases, we consider the evidence de novo, but we will not reverse the circuit court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Cooper v. Kalkwarf*, 2017 Ark. 331, 532 S.W.3d 58. A finding is clearly erroneous when, despite supporting evidence in the record, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.* Our court gives due deference to the superior position of the circuit court to view and judge the credibility of the witnesses. *Id.* This deference is even greater in cases involving child custody, as a heavier burden is placed on the circuit judge to use his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id.*

In determining whether a parent may relocate with a minor child, a circuit court must generally look to the principles set forth in our supreme court's decision in *Hollandsworth*, 353 Ark. 470, 109 S.W.3d 653, and *Singletary*, 2013 Ark. 506, 431 S.W.3d 234. In *Hollandsworth*, the supreme court announced a presumption in favor of relocation for custodial parents with sole or primary custody, with the noncustodial parent having the burden to rebut this presumption. In *Singletary*, the court explained that the *Hollandsworth* presumption does not apply when the parents share joint custody of a child. In a joint-custody arrangement where both parents spend equal time with the child, there is not one parent-child relationship to take preference over the other, and as such, the *Hollandsworth* rationale does not apply. The supreme court clarified its prior holdings in *Cooper*, *supra*, by

holding that the *Hollandsworth* presumption should be applied only when the parent seeking to relocate is not just labeled the "primary" custodian in the initial custody order but also spends "significantly more time" with the child than the other parent. *Cooper*, 2017 Ark. 331, at 15, 532 S.W.3d at 67. The court noted that a joint-custody arrangement does not necessarily involve a precise "50/50" division of time. *Id.* Parental influence, commitment, and involvement in the child's activities and responsibility for making decisions on behalf of the child are also important factors for the circuit court to consider in a relocation request. *Id.*

The proper analysis for a change-in-custody request due to the relocation of one parent in a joint-custody situation is the same as that when relocation is not involved; the court must first determine whether a material change in circumstances has transpired since the initial custody order and then whether the change in custody is in the best interest of the child. *Armstrong v. Draper*, 2019 Ark. App. 114, 571 S.W.3d 60.

Crissy's sole point on appeal is that the circuit court erred by applying the *Singletary* analysis when it modified custody on the basis of a material change in circumstance and a best-interest-of-the-child analysis. Specifically, Crissy argues that while the parties' divorce decree awarded them joint custody, that was not actually true in practice as she had custody of the children 74 percent of the time in 2012, 61 percent of the time in 2013, 58 percent of the time in 2014, 57 percent of the time in 2015, 64 percent of the time in 2016, and 65 percent of the time in 2017. Crissy argues that the parties "split" custody of the children with C.R.R. living primarily with her and V.O.R. living primarily with Gary. She argues that the *Hollandsworth* presumption should apply to the relocation request as to C.R.R. but

would not apply to the request as to V.O.R. She argues that it was legal error for the circuit court to apply *Singletary* in denying her motion to relocate. Furthermore, she contends that the circuit court should have applied two different standards because of their "split" custody arrangement. We disagree.

We first address Crissy's argument that the circuit court should have applied two different standards because of their "split" custody arrangement. This argument is not preserved for our court's review. Prior to any testimony being taken, the circuit court explicitly asked counsel for both parties to identify which line of cases supported their client's position on relocation. Crissy's counsel answered yes when asked, "Are – are you saying, I think as I understand, the *Hollandsworth* line of cases? Those typically – *Hollandsworth* applies when you have a parent with sole custody." Further, Crissy's counsel never made any argument below regarding the application of two different standards to this case. We are unable to reach the merits of Crissy's claim because she makes this argument for the first time on appeal. It is well established that appellants are precluded from raising arguments on appeal that were not first brought to the attention of the circuit court. *Norman v. Cooper*, 101 Ark. App. 446, 278 S.W.3d 569 (2008).

Next, Crissy argues that even if the *Hollandsworth* presumption is not applicable to both children or just to C.R.R., the circuit court did not properly apply the standard set forth in *Raymond v. Kuhns*, 2018 Ark. App. 567, 566 S.W.3d 142. We disagree. The circuit court applied the proper standard, which was the *Singletary* line of cases. The circuit court held that the parties had shared joint custody since the divorce, and the evidence supported the holding that the parties roughly shared equal time with the children since their 2012

divorce. While the parties may not have agreed on the exact percentages of time with the children for each year subsequent to the divorce, they primarily agreed that it was between a 60/40 and a 50/50 split throughout the years.

Furthermore, the circuit court was correct in determining that a material change in circumstances had occurred, and relocation was not in the best interest of the children. Here, it is clear that Crissy's move to Omaha was a significant factor in the circuit court's decision along with the parties' inability to cooperate in their parenting since Crissy's move. It would be impossible for the children to spend as much time as they previously did if they moved nine and a half hours away. Crissy's move to Omaha appears to be the catalyst to the disintegration of what had been an effective coparenting situation. The circuit court did not err in finding that a material change in circumstances occurred in this case.

Here, the circuit court made several specific factual findings to support its decision that V.O.R. and C.R.R.'s best interest would be best served by denying Crissy's petition to relocate and that it was in the best interest of the children to reside with one another in the primary custody of Gary. In its order, the court noted that the very marginal benefit of Crissy's move to Omaha does not outweigh the cost to the relationships between the parents and the children if one or both children were permitted to move to Omaha. The circuit court also noted that prior to the move, the parties had a very open and cooperative relationship. Furthermore, Crissy had no family connections in Omaha other than her husband's family; she moved to Omaha when she and her husband were separated; the Valley View schools are ranked highly in the state; and both children were doing well in school, participated in extracurricular activities, and had friends.

The circuit court's order went into extensive detail explaining how and why it came to the decision to not grant appellant's request for relocation. At its core, Crissy's argument is that we should reweigh the evidence in a manner that is more favorable to her, but credibility determinations are left to the circuit court, and this court will not reweigh the evidence. *Raymond*, 2018 Ark. App. 587, 566 S.W.3d 142. Given our standard of review and the special deference we give circuit courts to evaluate the witnesses, their testimony, and the children's best interest, we cannot say that the circuit court clearly erred in denying the motion for relocation and awarding primary custody to Gary.

Affirmed.

VAUGHT and BROWN, JJ., agree.

Richard E. Worsham, for appellant.

Owens, Mixon, Heller & Smith, P.A., by: *Aaron D. Heller* and *W. Lance Owens*, for appellee.