

Cite as 2023 Ark. App. 477
ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-23-46

DAVID BRAD HOUSE

APPELLANT

V.

KARMEN HOUSE

APPELLEE

Opinion Delivered October 25, 2023

APPEAL FROM THE OUACHITA
COUNTY CIRCUIT COURT
[NO. 52DR-18-208]

HONORABLE DAVID F. GUTHRIE,
JUDGE

AFFIRMED

WENDY SCHOLTENS WOOD, Judge

Brad House appeals an amended divorce decree entered by the Ouachita County Circuit Court on October 24, 2022, awarding primary physical custody of the parties' daughter, MC1, to Karmen House and standard visitation to Brad. The decree includes findings of fact and conclusions of law on the custody issue, which were entered by the circuit court on remand following a previous appeal to this court. Brad brings two points on appeal: (1) the chief justice lacked jurisdiction and authority under section 13 of amendment 80 to the Arkansas Constitution (Amendment 80) to assign a temporary special judge, and (2) the circuit court's award of custody and visitation is clearly erroneous. We affirm.

The parties in this case married in 2015, and MC1 was born that same year. In August 2018, the couple separated, and Karmen filed for divorce. On January 8, 2019, pending a

final divorce hearing originally scheduled the next week on January 15, the parties agreed to a temporary joint-custody order pursuant to which MC1 would spend Monday and Tuesday with Karmen, Wednesday and Thursday with Brad, and every other weekend with the alternate parent. The final hearing did not take place on January 15 but was postponed until December. At the hearing, Karmen requested primary custody, and Brad requested joint custody with equal time. On January 24, 2020, the court issued a letter opinion awarding “joint custody” to the parties but awarding “primary and unequal possession” to Karmen and “reasonable and seasonable visitation” consistent with “the guidelines” to Brad. The court entered a divorce decree on May 21, 2020, consistent with its letter opinion.

After the letter opinion was issued but before the divorce decree was entered, Brad twice requested that the court issue findings of fact and conclusions of law pursuant to Rule 52 of the Arkansas Rules of Civil Procedure, which the court declined to do. In an appeal from the court’s May 2020 order, we reversed and remanded, directing the circuit court to enter the requested findings and conclusions. *House v. House*, 2021 Ark. App. 380. Between the circuit court’s May 2020 order and this court’s October 2021 opinion, Judge David Guthrie, the circuit judge who had presided over the case, retired, and Judge Spencer Singleton replaced him.

On remand, Brad moved to enforce the circuit court’s January 2019 agreed temporary joint-custody order. He also requested a new trial of the custody issues, arguing that the new judge could not make findings about witnesses and testimony he “had no opportunity to observe and hear.” Pursuant to Amendment 80 and Administrative Order No. 16, Judge

Singleton asked Chief Justice Dan Kemp of the Arkansas Supreme Court to assign Judge Guthrie to the case for the limited purpose of entering findings of fact and conclusions of law. On February 17, 2022, the chief justice entered an order finding “a need for a special judge to be assigned and in the interest of judicial economy” and assigning Judge Guthrie to make findings of fact and conclusions of law in the case. On October 24, Judge Guthrie entered an order amending the divorce decree, attaching the court’s findings of fact and conclusions of law specifically explaining its May 2020 decision, and ordering all other provisions of the May 2020 decree to remain in full force and effect. Brad filed this appeal.

For his first point on appeal, Brad argues that the chief justice lacked jurisdiction and authority under Amendment 80 and Administrative Order No. 16 to assign Judge Guthrie to this case. Section 13 to Amendment 80 provides in pertinent part as follows:

(C) If a Circuit or District Judge is disqualified or temporarily unable to serve, or if the Chief Justice shall determine there is *other need* for a Special Judge to be temporarily appointed, a Special Judge may be assigned by the Chief Justice or elected by the bar of that Court, under rules prescribed by the Supreme Court, to serve during the period of temporary disqualification, absence or need.

Ark. Const. amend. 80, § 13(C) (emphasis added).

Administrative Order No. 16 prescribes the rules for assigning temporary special judges, defining persons authorized to serve (specifically listing retired circuit court judges), and providing a process for the assignment of judges in the event of “disqualification, temporary inability to serve, or other need as determined by the Chief Justice.” Ark. Sup. Ct. Admin. Order No. 16(I) (2022). The process includes establishing a proper basis for assignment—one of which is “[o]ther need as determined by the Chief Justice”—and

considering certain factors in selecting the judge to be assigned, which includes the type and complexity of the case; the amount of time needed for the assignment; the geographic location of the case and assigned judge; and the consent of the judge selected. Ark. Sup. Ct. Admin. Order No. 16(II), (V).

We review a circuit court's interpretation of a constitutional provision de novo. *Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship*, 2021 Ark. 183, at 8, 632 S.W.3d 284, 289. Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. *Id.*, 632 S.W.3d at 289. Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Id.*, 632 S.W.3d at 289.

Amendment 80 clearly authorizes the chief justice to assign a special judge if he or she determines "there is other need for a Special Judge to be temporarily appointed," as Chief Justice Kemp determined there was here. Ark. Const. amend. 80, § 13(C). Brad recognizes the chief justice's authority under Amendment 80 but argues that there are no "rules prescribed by the Supreme Court" governing the assignment for "other need." In support of his argument, he cites *Dawson v. Stoner-Sellers*, 2019 Ark. 410, 591 S.W.3d 299, claiming that the supreme court found "a gap" in the rules for addressing "other need."

In *Dawson*, the supreme court specifically rejected an argument similar to Brad's. At issue in *Dawson* was the administration of several family trusts. 2019 Ark. 410, at 1, 591 S.W.3d at 301. A special judge was requested and assigned "for the sake of judicial economy" because the newly elected circuit judge would not have a "civil term" in the county in 2018.

Chief Justice Kemp appointed the retired circuit judge who had presided over the case before his retirement to hear the case. *Id.* at 5, 591 S.W.3d at 303. The appellant argued that the chief justice lacked jurisdiction to assign the special judge because not all judges in the circuit had recused as required by section III of Administrative Order No. 16, which governs assignments when a circuit judge recuses. The court held that the appellant ignored the broad language of Amendment 80 and section II of Administrative Order No. 16, which provide the chief justice with the authority to assign a special judge if he determines there is “other need” for a special judge. The court determined the assignment in the case was not due to the circuit judge’s recusal: “Here, the chief justice apparently determined there was a need for a special judge for the sake of judicial economy due to the assigned circuit judge’s docket.” *Id.* at 7, 591 S.W.3d at 304. The court specifically addressed the argument Brad makes to us: “[T]he procedures fail to address an assignment based on other need as determined by the chief justice. Nonetheless, this gap in the procedures set out in section (III) does not affect the authority of the chief justice pursuant to Amendment 80 to assign a special judge when he determines that a need exists.” *Id.* n.5, 591 S.W.3d at 304 n.5.¹ Although Brad acknowledges this, he argues that the supreme court’s “conclusion is incorrect.” We cannot overrule the supreme court’s precedent, and we reject Brad’s

¹We note that the supreme court confirmed this interpretation of Amendment 80 and Administrative Order No. 16 in *Russell v. Payne*, holding that the chief justice has the authority to assign a special judge if the chief justice determines an “other need,” and it affirmed the appointment of a special judge when the sitting judge had a sudden illness. 2020 Ark. 377, at 3.

argument. *Farm Credit Midsouth, PCA v. Bollinger*, 2018 Ark. App. 224, at 20, 548 S.W.3d 164, 177.² The chief justice had the authority and jurisdiction under Amendment 80 to assign Judge Guthrie to this case on the basis of his determination of “other need.”

We now direct our review to Brad’s second point on appeal that the court’s ruling on custody and visitation is clearly erroneous. Specifically, he argues that the evidence was insufficient to overcome the statutory preference for joint custody, and even without the statutory preference, the evidence was insufficient to support a finding that it was in MC1’s best interest for Karmen to have primary custody and Brad to have visitation.

An award of joint custody is favored in divorce cases,³ and when in the child’s best interest, custody should be awarded in such a way as to assure the frequent and continuing contact of the child with both parents. *Grimsley v. Drewyor*, 2019 Ark. App. 218, at 8, 575 S.W.3d 636, 641. The primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Fox v. Fox*, 2015 Ark. App. 367, 465 S.W.3d 18. We perform a de novo review of child-custody matters, but we will not

²Brad also argues that since the chief justice lacked jurisdiction to appoint a special judge, Judge Singleton should have scheduled a new trial pursuant to Arkansas Rule of Civil Procedure 63. Given our holding that the chief justice had jurisdiction and authority to assign Judge Guthrie to the case, we decline to address the Rule 63 argument.

³Ark. Code Ann. § 9-13-101(a)(1)(A)(iii) (Repl. 2020). 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, requiring clear and convincing evidence to overcome. This version of the statute was not in effect when the circuit court entered the divorce decree herein and is therefore not relevant to our analysis.

reverse the circuit court's findings unless they are clearly erroneous. *Hamerlinck v. Hamerlinck*, 2022 Ark. App. 89, at 12, 641 S.W.3d 659, 665. 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.* at 12–13, 641 S.W.3d at 665. Finally, we recognize and give special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interest. *Id.* at 13, 641 S.W.3d at 666.

At the time of the hearing, MC1 was four years old and was in preschool. Karmen has two children from a previous marriage—MC2 (a six-year-old son) and MC3 (a ten-year-old daughter). Brad worked for Georgia-Pacific Monday through Thursday from 6:00 a.m. to 3:00 p.m. and from 6:00 a.m. to 2:00 p.m. on Friday. He was on call twenty-four hours a day, seven days a week. He testified that he leaves the house between 5:15 and 5:30 a.m. Karmen was a director over workforce training for Southern Arkansas University and worked Monday through Friday from 7:00 a.m. to 4:00 p.m.

Karmen provided detailed testimony about the parties' life together when they were married. She said that she dropped MC1 off at the bus for preschool between 6:30 and 6:50 a.m. and picked her up from daycare on her way home. Karmen testified that she cooked every night except one, when Brad would get fast food or make leftovers or a sandwich. Brad testified that during the temporary joint-custody arrangement, he cooked two of the three nights and at least one night on the weekend.

After Brad left in the morning, Karmen made the children's breakfast, got them ready for school, sent her two older children to their grandparents' house, and dropped MC1 at

daycare. Karmen testified that she attended all of her older children's events and that Brad did not attend any. She said Brad rarely helped with meals or housekeeping. Karmen testified that when she got home from work, Brad was either "having a cold one," watching television, or napping. She said he drank daily: a twenty-four-ounce beer on the way home and a twelve or fifteen pack when he was home. She said on Fridays, he would get a thirty pack of beer and was intoxicated in front of the children every weekend. Brad admitted drinking when the parties were married, but he testified that he did not drink when he had custody of MC1.

Karmen testified that Brad did not like MC3 and "picked on her" because she had a close relationship with Karmen's mother, Kathy Cobb. She said he called MC3 names, such as "a brat" and "spoiled," and he would lock her out of the house. She said that he uses profanity toward MC2, and if something happens and MC2 "runs to mama and cries," Brad tells him that he is "gay and queer." Brad denied this. Although Brad admitted that MC1 has a close bond with her two siblings, according to Karmen, he did not allow MC1 to watch a movie with MC2 and MC3 because they were not his children. She said Brad did not participate in birthday parties for the children or in preparations for Christmas. She testified that she decorated, purchased the gifts, and put together the Santa presents. She said Brad was not involved in MC1's medical appointments and on one occasion would not "get out of bed" to go with Karmen and MC1 to the emergency room when MC1 had a temperature of 104 degrees.

Karmen testified that Brad was very controlling during their marriage and had been physically violent with her. Karmen said Brad did not discipline MC1, would not allow her

to discipline MC1, and allowed MC1 to “rule the roost.” She testified that when MC1 returns from Brad’s house, she “acts out” and that there have been issues at school on days Brad has had custody. She said with Brad gone, she may discipline MC1, redirect her, and teach her what is acceptable behavior. She also said that she gets little to no cooperation from Brad. As an example, she testified that the parties’ lawyers had to help them agree on the outfit MC1 would wear on the first day of school. She said that it was “Brad’s way or no way” and that during the temporary joint-custody arrangement, Karmen was not allowed to see MC1 on Mother’s Day or her birthday and was allowed only an hour of time on MC1’s birthday. She also said that Brad did not allow MC1 to participate in activities such as T-ball or cheerleading when she is with him, although Brad testified that he would “compromise as much as possible” on these things to get joint custody of MC1. Karmen said that she did not think the temporary joint-custody arrangement was good for MC1 because she has no consistency, does not know if she is “coming or going,” and misses events with her siblings.

Karmen and her children remained in the parties’ marital home on twelve acres next to Karmen’s parents’ home after the parties separated. Karmen’s mother, Kathy, is a retired teacher and works for the Arkansas Department of Human Services Division of Children & Family Services as a behavior consultant and mental-health coordinator. Kathy testified that she takes the older children to school every day, picks them up, and often takes them to extracurricular activities to help Karmen. She testified that she goes to all the children’s events and that Brad never attends any of them. Kathy said that since the parties separated, she sees MC1 every day, but when the parties were together, Brad did not allow MC1 to be

around her. Kathy testified that Brad and Karmen argued every day when they were together. She opined that MC1 is a happy child but had developed behavioral issues since the parties had separated.

One of Karmen's friends, Kyra Jerry, testified that she works with Karmen, drops by the parties' home "monthly," and attends some of the children's sporting events and assemblies. She said she never saw Brad doing anything with the children. She also said that she had never seen Brad at any of the children's events. She said that Karmen takes care of the children.

In its October 2022 order and findings of fact and conclusions of law, the court awarded joint legal custody to the parties but found it was in MC1's best interest to award primary custody to Karmen with visitation to Brad every other weekend, one day a week on the off weeks, alternating holidays, and every other week in the summer. The circuit court prefaced its findings of fact by stating that the initial consideration for a joint-custody arrangement is whether the parties can cooperate and share decision making on issues involving the child, stating that absent such a relationship, joint custody is not proper. Regarding cooperation between these parties, the court found "there was a total lack of communication and cooperation while the parties were together." The court noted that Karmen and Kathy both testified that Brad was "unwilling to compromise and extremely controlling," that Karmen testified that Brad was physically violent with her on more than one occasion when her children were present and that this behavior has continued since the separation, and that the parties' inability to coparent was so significant they had to sign a

coparenting agreement with the school. Without specifically finding which party was most at fault for the discord, the court found “overwhelming proof” that the parties were unable to communicate or get along.

The court then set forth a detailed review of the evidence and found that it was in the best interest of MC1 for Karmen to have primary custody. The court determined that the parties’ past conduct supported an award of primary custody to Karmen, finding that Karmen had been the primary caretaker of MC1 during the parties’ marriage. The court specifically found that Karmen woke her; fed and clothed her; prepared all her meals; dropped her off and picked her up from daycare; performed all housework; took her to all medical appointments; and planned all birthdays and holidays. The court found that MC1 had a very close bond with MC2, MC3, and Karmen’s parents; that she had lived in the same home with them her entire life; that it would be detrimental to MC1 to remove her from Karmen’s home; that an award of primary custody to Karmen would promote stability in MC1’s life; and that Karmen was more likely to promote a relationship between MC1 and Brad than Brad would between MC1 and Karmen if he was awarded primary custody. The court noted that Karmen’s work schedule was better suited to accommodate MC1’s schedule and that MC1 would need to wake up at 4:30 a.m. to accommodate Brad’s schedule. The court also found credible the testimony that MC1 did not get consistency under the parties’ temporary joint-custody arrangement, that she had behavioral issues since the parties’ separation, and that Brad did not allow MC1 to participate in extracurricular activities during his time with her.

On appeal, Brad recounts the testimony and challenges the court's finding that the parties could not cooperate; that Kathy is an unbiased expert on four-year-old children; and that he did not have a strong bond with MC1. He argues that the parties had no visitation-exchange issues in the eleven months that the temporary joint-custody order was in effect, that there was no evidence that MC1 preferred one parent over the other, that it was undisputed that he no longer drank around MC1, and that most of Karmen's complaints involved the parties' domestic disputes, which he argues are irrelevant to custody and visitation. He argues that the evidence was not sufficient to overcome the statutory preference for joint custody.

Brad's arguments are simply a request that we reweigh the evidence, reevaluate the witnesses' credibility, and evaluate both differently than did the circuit court. However, we do not reweigh evidence in these cases: rather, we give special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the children's best interest. *Hamerlinck*, 2022 Ark. App. 89, at 15, 641 S.W.3d at 667. Each child-custody determination ultimately must rest on its own facts, and the record in this case is clear that the circuit court carefully considered all the evidence in its detailed and thorough findings and conclusions. *Cunningham v. Cunningham*, 2019 Ark. App. 416, at 8, 588 S.W.3d 38, 42. Finally, despite joint custody being favored, our law remains that the mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of an award of joint custody. *Li v. Ding*, 2017 Ark. App. 244, at 10-11, 519 S.W.3d 738, 744. The circuit court gave great weight to its finding

that the level of cooperation and communication that is required for joint custody was lacking here. On de novo review of this record, we are not left with a definite and firm conviction that the circuit court made a mistake.

Affirmed.

MURPHY and BROWN, JJ., agree.

Brett D. Watson, Attorney at Law, PLLC, by: *Brett D. Watson*; and *Dobson Law Firm, P.A.*,
by: *R. Margaret Dobson*, for appellant.

Taylor & Taylor Law Firm, P.A., by: *Tory H. Lewis, Andrew M. Taylor*, and *Tasha C. Taylor*, for appellee.