

[2] Though there was countervailing evidence of Walter's character and penchant for nonviolence, we have stated repeatedly that we are not required to give each factor under § 9-27-318(e) equal weight or force. *See, e.g., Williams v. State*, 313 Ark. 451, 856 S.W.2d 4 (1993); *Wicker v. State*, 310 Ark. 580, 839 S.W.2d 186 (1992); *Ashing v. State*, 288 Ark. 75, 702 S.W.2d 20 (1986).

[3] Far from being clearly erroneous which is our standard of review (*see Wicker v. State, supra; Bradley v. State*, 306 Ark. 621, 816 S.W.2d 605 (1991)), the circuit court was eminently correct in finding clear and convincing evidence of why the transfer should not be made. Walter was charged with four counts of aggravated robbery and terroristic acts, all of which involve patently violent acts, and we have held that a charge itself may be a sufficient basis for denying a transfer. *Tucker v. State*, 313 Ark. 624, 855 S.W.2d 948 (1993); *Holland v. State*, 311 Ark. 494, 844 S.W.2d 943 (1993); *Vickers v. State*, 307 Ark. 298, 819 S.W.2d 13 (1991); *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991), *reh'g denied*, 304 Ark. 402A, 805 S.W.2d 80 (1991). Bolstering the charges was the testimony of Officer Ronnie Smith, who outlined a clear robbery escapade where Walter acted in concert with a gunman who fired and wounded the two victims. Walter then took the wallet of one of the victims. We find no error under such circumstances.

Affirmed.

John I. PURTLE v. COMMITTEE ON
PROFESSIONAL CONDUCT

93-1018

878 S.W.2d 714

Supreme Court of Arkansas
Opinion delivered June 6, 1994

1. ATTORNEY & CLIENT — NO SUBSTANTIAL EVIDENCE TO SUPPORT REPRIMAND FOR FAILURE TO CONSULT. — Where appellant advised his clients to get suitable housing and employment before a scheduled custody hearing in which the clients were attempting to gain cus-

tody of their two children from the grandparents, which they did not do; consulted the clients about a continuance requested by the grandparents; and then agreed to an order drafted by the grandparents' counsel that by agreement of the parties the grandparents were awarded custody of the two children until further order of the court, which left custody just as it had been, there was no substantial evidence to support the Committee's decision to reprimand appellant for violating Model Rules of Professional Conduct 1.2(a) requiring counsel to consult with the client as to the means by which the objectives of the representation are to be pursued.

2. PARENT & CHILD — CUSTODY — ALL ORDERS TEMPORARY. — There is, in effect, no "final order" in a custody case, until the children have reached their majority; in essence all orders of custody are "temporary," by their very nature.
3. PARENT & CHILD — CUSTODY — BEST INTEREST OF CHILD. — Custody is determined by what is in the best interests of the children and is not altered absent a material change in circumstances; the unyielding consideration in child custody matters is the welfare of the children.
4. PARENT & CHILD — CUSTODY — NATURAL PARENTS PREFERRED CUSTODIAN. — The natural parent is the preferred custodial parent; custody is generally not granted to someone other than the natural parent or parents absent a finding of lack of fitness of the natural parent.

Appeal from the Committee on Professional Conduct;
reversed and dismissed.

John I. Purtle, for appellant.

Cearly Law Firm, by: *Robert M. Cearly, Jr.*, for appellee.

CATHLEEN V. COMPTON, Special Chief Justice. In May of 1988, Susan Stafford was divorced from her husband, Steve Woodrow Stafford, by order of the Chancery Court of Pulaski County. There were two children born to the marriage, Christy and Mitchell. The decree of divorce granted custody of Christy and Mitchell to Susan Stafford, but with a special provision: she was not allowed to remove the children from the residence of her parents, Margie and Cletus Davis, without prior permission of the Court.

In January of 1991, Mr. and Mrs. Davis, who had intervened in their daughter's divorce action, were granted custody of Christy and Mitchell. The order of January 31, 1991, was entitled "Order of Temporary Custody & Granting Intervention." The order stated

among other things that “[T]he prior Decree of this Court granting custody of the children to the Plaintiff is hereby modified and *sole* custody of Christy and Mitchell Stafford is given to Cle-tus and Margie Davis pending further Order of the Court.” (Emphasis ours.)

On February 12, 1991, this order was reaffirmed. A hearing was set for April 1991, but never occurred.

In August of 1991, following their reconciliation, Susan and Steve Stafford hired the appellant, John Purtle, to represent them in an effort to regain custody of their children. A review hearing was already set for December 12, 1991. Although no hearing occurred, an order was entered on December 13, 1991.

The appellant had advised the Staffords to obtain suitable housing and employment prior to custody hearings. In December of 1991, they had failed to attain those goals. When Robert Newcomb, counsel for Susan Stafford’s parents, requested a continuance of the December 12, 1991 hearing due to Margie Davis’s health, the appellant, after consultation with his clients, agreed to the continuance. An order drafted by Mr. Newcomb was entered on December 13, 1991. That order stated that “[B]y agreement of the parties the Intervenor is awarded custody of Christy Stafford and Mitchell Stafford *until further order of this Court.*” (Emphasis ours.) It is the wording and effect of that order which lead to this appeal.

Susan Stafford filed an affidavit on December 21, 1992, in which she alleged that John Purtle had violated Model Rule of Professional Conduct 1.2(a) in that he had failed to consult with her as to the means by which the objectives of the representation were to be pursued, and that he had engaged in conduct prejudicial to the administration of justice, all based on the language of the order entered on December 13, 1991.

[1] Following a hearing before the Supreme Court of Arkansas Committee on Professional Conduct on May 15, 1993, a Letter of Reprimand was issued to John Purtle by the Committee. It is from that Letter of Reprimand that John Purtle appealed. The decision of the Committee is reversed, and the complaint is dismissed.

We hear appeals from the Committee's decisions *de novo*.

The issue on appeal is whether the decision of the Committee was supported by substantial evidence. We hold that it was not.

The confirmation letter sent to John Purtle by the Committee states that Purtle violated Rule 1.2(a) of the Model Rules of Professional Conduct, and further states as follows:

This Rule states, in part, that a lawyer shall consult with the client as to the means by which the objectives of the representation are to be pursued.

It is uncontroverted that the objective of the representation was to regain custody of the Staffords' children. Both Ms. Stafford and Mr. Purtle testified that Mr. Purtle had told the Staffords that they needed to obtain suitable housing and employment before this objective could be satisfied. The Staffords were, at the time they hired Mr. Purtle, living in a three bedroom house with about a dozen other people, and neither of them was gainfully employed. By December of 1991, the Staffords had either gotten a mobile home but had no beds for their children, or were living with Mr. Stafford's parents. The record is not altogether clear.

The Staffords were consulted about the continuance of the December 12, 1991 hearing, and were agreeable to the continuance. However, some weeks following the discussion of the continuance, they went to the courthouse and looked at their file. Upon seeing the order of December 13, 1991, they took it to another attorney, Gene Fitzhugh, who advised them, according to Ms. Stafford, that the order granted full custody of Christy and Mitchell to her parents, and that it was, in some form, a final order. The Staffords then took the position that Mr. Purtle had "sold them out."

Margie Davis, the mother of Susan Stafford, testified at the Committee hearing. Her testimony is critical. She told the Committee that the order of December 13, 1991, was, in her opinion, an order of continuance. She also noted that her attorney had always told her that "... nothing is final, ever ... until they're eighteen years old" In her mind, the order of December 13, 1991, changed nothing. She believed that the situation that had

existed clearly since January 1, 1991, and arguably since May 5, 1988, was going to be continued.

Robert Newcomb, the Davises' attorney, also considered that the December 13, 1991 order simply continued the status quo. The only change brought about by the December 13, 1991 order was a potential increase in visitation to the Staffords.

Susan Stafford was asked by Mr. Virden of the Committee the following question: "If after that word, 'awarded,' if that had said 'temporary,' would you have had any problem?" Her answer was, "No, sir."

The appellant was reprimanded by the Committee on account of semantics, and nothing more. In its decision, the Committee elevated form over substance. The Rules of this Court regulating Professional Conduct of Attorneys at Law set forth the Purpose of the Rules, and further set forth the authority and powers of the Committee. At no point in the Rules is it stated that the Committee shall substitute its views for that of the attorney being investigated. Had Mr. Purtle allowed his clients to proceed to hearing on the merits of their case on December 12, 1991, they might well have had a legitimate complaint against him because their case was so weak. The continuance was clearly in their best interests, and in furtherance of the objective of the representation.¹

The record is important to establish a context for this decision. Mr. and Ms. Stafford hired Mr. Purtle to obtain custody of their two minor children. From May of 1988, they had basically abandoned their children to Mr. and Mrs. Davis. Following entry of the divorce decree, it is unclear what happened to Mr. Stafford. Ms. Stafford became involved with a man in Texas (while her parents cared for her children). She married a man (while her parents cared for her children), and she divorced him (while her parents cared for her children). She ultimately reconciled with Mr. Stafford, which led to her parents obtaining an order of intervention and custody. Each order, whether ex parte or otherwise,

¹ Parenthetically, we note that a hearing before the Committee is an adversarial proceeding which can substantially affect the rights of the respondent attorney. Attorneys responding to a complaint brought before the Committee should give serious consideration to representation by counsel.

granted custody of Christy and Mitchell to Mr. and Mrs. Davis. These orders, other than the one dated December 13, 1991, had been entered by other attorneys before Mr. Purtle's services were engaged. Nothing has changed from January 31, 1991 to the present. As of the date of the hearing before the Committee on May 15, 1993, although new counsel had been retained by the Staffords, and the case reopened, Christy and Mitchell continued to reside with and be in custody of their grandparents. There has been no damage nor any harm done to Mr. and Ms. Stafford by any action of Mr. Purtle. In another context, the action of Mr. Purtle would be referred to as "harmless error."

[2, 3] There is, in effect, no "final order" in a custody case, until the children have reached their majority. Custody is determined by what is in the best interests of the children, and is not altered absent a material change in circumstances. Ark. Code Ann. § 9-13-101 (1987); *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). In essence, all orders of custody are "temporary," by their very nature. The unyielding consideration in child custody matters is the welfare of the children. *Stephenson v. Stephenson*, 237 Ark. 724, 375 S.W.2d 659 (1964).

[4] The record on appeal is woefully inadequate, and is silent as to why Mr. and Mrs. Davis originally obtained custody. However, the law is that it is the natural parent who is the preferred custodial parent. *Shuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990). Custody is generally not granted to someone other than the natural parent or parents absent a finding of lack of fitness of the natural parent. *Feight v. Feight*, 253 Ark. 950, 490 S.W.2d 140 (1973). It may be inferred from the orders of January and February of 1991, that the Chancellor found that Mr. and Ms. Stafford were unfit to raise their children, and that it was in Christy's and Mitchell's best interests to live with their grandparents.

Mr. Purtle's job was to advise and counsel with the Staffords as to how to obtain their goal of regaining custody of their children. He so advised, and his advice, for all practical purposes went unheeded.

The decision of the Committee must be reversed, and the complaint of Ms. Stafford must be dismissed.