

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA09-1108

KATHLEEN LIPPS

APPELLANT

V.

ROBERT LIPPS

APPELLEE

Opinion Delivered APRIL 7, 2010

APPEAL FROM THE OUACHITA
COUNTY CIRCUIT COURT
[DR-2008-439-1]

HONORABLE HAMILTON H.
SINGLETON, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Kathleen Lipps (Kathy) appeals from an order awarding custody of the parties' minor son to the child's father, Robert Lipps. First, she contends that the trial court's decision was clearly erroneous and should be reversed. Alternatively, she claims that the trial judge developed a bias against her; therefore, she asks us to remand the case for a trial before an impartial, unbiased judge. We hold that the trial court's decision awarding custody to Robert was not clearly erroneous. Because Kathy did not raise the issue of bias in the trial court or ask the judge to recuse, this issue is not preserved for appellate review. Therefore, we affirm.

Robert and Kathy were married on September 15, 2007. Shortly thereafter, Robert, a member of the Arkansas National Guard, was called to active duty in Iraq. In January 2008, Robert went to Camp Shelby in Mississippi for training. Kathy called him while he was in Mississippi to tell him that she was pregnant. Six months later, when Robert was in Iraq, he

learned that Kathy was having an affair with Troy Whittington. Robert saw pictures on Kathy's My Space page of Kathy and Troy lying in bed together kissing. When confronted by Robert on the phone, Kathy admitted the affair.

On September 13, 2008, the parties' son was born. Robert was granted a fifteen-day leave from Iraq to attend the birth and visit his son. Robert returned to Arkansas on December 22, 2008, at the end of his duty; and on December 23, 2008, he filed for divorce. At the same time, he filed a motion for emergency custody of his son. In an affidavit attached to the motion, Robert contended that Kathy began an affair with another man in May or June of 2008 while she was pregnant with Robert's child; that Kathy began living with this man in his parents' home in November 2008; and that the home was known by local law enforcement as a gathering place for drug users. He also suspected that Kathy was using illegal drugs.

The trial court held a temporary hearing on January 5, 2009. Although no specific proof of drug use was offered at the hearing, Robert and one of his friends testified that, when Kathy brought the child to Robert for Christmas visitation, all of the clothes in the child's bag smelled like marijuana. Kathy denied any drug use, but she admitted having an affair with Troy while married to Robert and pregnant with Robert's child and she admitted to living with Troy in his parents' home from November 2008 until several days before the hearing. She testified that she, Troy, and her son shared a bedroom in the two-bedroom home. She said that she moved out of Troy's home when her attorney told her that she

should. She also said that she intended to continue her relationship with Troy; that she would still be living with him if “it weren’t for this litigation”; and that she did not know if it was wrong to live with another man with her baby.

On January 8, 2009, the trial court entered a temporary order granting joint custody but required the child to live at Kathy’s parents’ home when Kathy had custody. From the bench, the trial judge admonished Kathy, stating that “I don’t know where your mom and dad went wrong, and I don’t think they did, and I guess this is a nightmare every parent faces is when you have got a child that acts like a slut, quite frankly, a slut.” The trial judge simply appeared dumbfounded by Kathy’s actions, and stated in the court’s order that, in his “fourteen years as Judge and twenty years as attorney, the Court has never seen such blatant conduct on the part of a mother. It is nothing short of unbelievable. [Kathy’s] parents tried to convince [her] to change her lifestyle without success.” The court concluded, saying that it was “unimpressed with [Kathy’s] conduct.”

A final hearing was held on February 6, 2009. The trial court granted Robert a divorce in a decree entered February 17, 2009, but it took the issue of permanent custody under advisement. Finally, on March 4, 2009, the court entered an order awarding custody to Robert. The court found that both parties were able and capable of raising the child. But the court had no confidence in Kathy’s ability to conduct herself appropriately with the child if she were not living with her parents. It was this fact that most influenced the court’s decision: “How can the Court award custody of a child to the mother and require that

mother to live with her parents while the other parent is fit and has demonstrated that he can raise this child without parental supervision or restriction[?]" In the court's view, it could not. And thus the court awarded custody to Robert.

We review child-custody cases de novo, but we will not reverse a circuit court's findings unless they are clearly erroneous. *Taylor v. Taylor*, 353 Ark. 69, 77, 110 S.W.3d 731, 735 (2003). Because the question of whether the circuit court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Sharp v. Keeler*, 99 Ark. App. 42, 44, 256 S.W.3d 528, 529 (2007). There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children. *Judkins v. Duvall*, 97 Ark. App. 260, 267, 248 S.W.3d 492, 497 (2007).

I.

The primary consideration in child-custody cases is the welfare and best interests of the child involved; all other considerations are secondary. *Hicks v. Cook*, 103 Ark. App. 207, 210-11, 288 S.W.3d 244, 247 (2008). The court heard testimony from both parties and numerous witnesses. Robert testified that he and his mother were moving to Mississippi for at least one year for him to train soldiers at Camp Shelby for deployment to Iraq. He and his mother, Rachel Gallagher, both testified that she would live with Robert and the child and take care of the child while Robert was working. Rachel testified that she was sixty years

old, was from Mississippi, had raised six children, and was currently living with her daughter and helping her raise her child, Rachel's two-year-old granddaughter. She testified that—in spite of various health problems including lung problems from smoking, arthritis, and high blood pressure—she was positive that her conditions would not keep her from taking care of her grandson. Several people also testified that Robert was a great father.

Kathy testified that she had not seen Troy since the temporary hearing, that she had no plans to see him, and that she planned to continue living with her parents for a while. She expressed concern about Robert's mother keeping her son because Rachel was a smoker and had health problems. While she testified that she had learned from her mistakes and that “no man is worth losing my son over,” she said that she had not talked with Troy in a month but “if the situation arises after I'm divorced, then, maybe.” She said that she might date him if he asked her out. Kathy's mother and a friend testified that Kathy was a very good mother.

The court found that both parties were capable of raising the child. The evidence supports this. The distinguishing factor to the court in this case was its concern about Kathy's fitness as a parent if she were to move out of her parents' house. After reviewing all of the testimony from both hearings, we find that the evidence justifies the trial court's concern. Robert was more financially stable than Kathy and had demonstrated his ability to take care of his son. Kathy's past behavior and her equivocal testimony left the trial court uncertain about her ability to consider the child's best interests if she were not living with her parents. While she did appear at the final hearing to accept that living with Troy with her new baby

had been “wrong,” her focus remained on the fact that cohabitation could cause a loss of custody—that is, the courts frown on it—and not that it might be harmful to her child.

Particularly in light of the deference we afford the trial court in custody determinations, we are satisfied that the trial court committed no clear error. Accordingly, we affirm its decision.

II.

Kathy devotes a significant portion of her brief to her argument that cohabitation—in particular, her cohabitation with Troy—is an accepted practice in modern society and is not harmful to a child’s well being. She alleges that the judge’s disagreement with this premise—and his clearly expressed concern with Kathy’s choices in this matter—caused him to award custody to Robert as a way to punish her. She contends that the judge was biased and she requests that we reverse and remand her case for a new trial with an impartial judge.

Although we are deeply troubled by the trial judge’s disparaging and intemperate remarks from the bench at the temporary hearing, we cannot address this point on appeal. Kathy made none of these arguments to the trial court. Nor did she move for the judge’s recusal. We do not address arguments raised for the first time on appeal. *Terry v. White*, 374 Ark. 366, 373, 288 S.W.3d 194, 199 (2008).

Affirmed.

MARSHALL, J., agrees.

BAKER, J., concurs.

Cite as 2010 Ark. App. 295