NOT DESIGNATED FOR PUBLICATION

DIVISION IV

CA05-1191

April 19, 2006

DONNA BLAIR	APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [DR-03-5942]
V.		HON. HOBSON VANN SMITH, CIRCUIT JUDGE
KELLY BLAIR	APPELLEE	AFFIRMED

Appellant Donna Blair appeals following the decision of the Pulaski County Circuit Court to award custody of her minor child, C.B., to the child's father, appellee Kelly Blair. She argues on appeal that the trial court erred in its decision to give custody of the child to Kelly and that the trial court incorrectly considered evidence regarding her arrest for possession of methamphetamine. We disagree and affirm.

Donna and Kelly Blair were married on February 16, 2001, and on October 1, 2002, their daughter, C.B., was born. The couple separated on August 15, 2003. Donna filed for separate maintenance, and Kelly later countersued for divorce. Kelly was not present at the separate-maintenance hearing, and the court awarded temporary, full custody of C.B. to Donna. On February 9, 2004, the court modified the order to allow Kelly visitation with the child.

Shortly after the modified order was entered, problems between Donna and Kelly escalated. Each side pointed to the other as the cause of the disagreements. Donna alleged that

Kelly never returned her calls or pages; Kelly maintained that Donna called him multiple times a day and during all hours of the night. Allegations were hurled that during the exchange of the child, each party would curse and scream at the other. The disagreements became so severe that the court held both parties in contempt and placed them in jail.

On March 26, 2004, Donna was arrested after the contents of a methamphetamine lab were found in her vehicle. Donna maintains that a friend was helping her move and that the friend, without Donna's knowledge, had placed the items in her vehicle. The friend did in fact admit the drugs were his. Donna, however, pled no contest to the charges and was sentenced to three years' probation, four mandatory drug tests, three hundred hours' community service, twenty mandatory meetings, and six months' suspended driver's license. Based on Donna's arrest, Kelly filed for an emergency change of temporary custody, which the court granted without a hearing.

Although the matter was set for a final hearing in the spring of 2004, the court continued the case at the request of the parties. Shortly thereafter, more contempt motions were filed. On April 29, 2005, the court conducted the final hearing to determine custody. In the divorce decree, the court enumerated thirty-four findings of fact regarding the testimony presented at the hearing and the parties' abilities to take care of C.B. The court noted that it had considered all the testimony and evidence presented and found that neither party was acting in the child's best interest. The court then stated that:

> [e]ach party has their own selfish interest which they are trying to protect. On the one hand, [Kelly] has taken good care of [the child] since he was awarded custody in April 2004 but he continually uses improper language in front of the child and denies [Donna] reasonable access to the child. [Donna] has been arrested and pled nolo contendere to possession of methamphetamine and ... has caused problems at every visitation exchange ... and continually called [Kelly] at work so as to almost affect his employment status.

The court recognized that it had a difficult decision to make, and taking everything into consideration, awarded permanent custody to Kelly subject to liberal visitation by Donna.

For her first point, Donna argues that the trial court clearly erred in awarding custody of the parties' minor child to Kelly. Equity cases are tried de novo on appeal. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). We will not disturb a trial judge's findings unless they are clearly against the preponderance of the evidence. *Id.* at 112, 986 S.W.2d at 106. Because the question of preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the trial court. *Id.*, 986 S.W.2d at 106. We know of no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carries as great a weight as those cases involving children. *Id.*, 986 S.W.2d at 106. A finding is clearly erroneous or clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*, 986 S.W.2d at 106. We have no such firm conviction in this case.

The court carefully weighed all the evidence in this case, as is apparent based on the lengthy and detailed discussion of the facts in the divorce decree. Although the court did note that it was dissatisfied with the actions of both Donna and Kelly, it found, based on the facts as presented at the final hearing, that it was in the child's best interest to stay with Kelly. After reviewing the record, we are satisfied that the court did not clearly err in its decision.

Donna's second allegation of error is that the trial court should not have considered evidence that she had been arrested. She argues that it was improper for the trial court to consider her plea for possession of methamphetamine because, pursuant to Act 346, her entire file was to be sealed. We disagree. Act 346, also known as the Arkansas First Offender Act, only allows a record to be sealed once the defendant completes the terms and conditions of

probation. Ark. Code Ann. § 16-93-303 (Repl. 2006). Because Donna was placed on probation for three years beginning April 4, 2005, she had not completed her probation and was therefore ineligible for the relief accorded in § 16-93-303.

She alternatively contends that her arrest record and plea statement were improperly admitted hearsay that was more prejudicial than probative under Rule 403 of the Arkansas Rules of Evidence. However, Donna did not preserve this issue for appeal. During the hearing, she objected to the introduction of her arrest record and plea on the basis of relevancy. We only review arguments that have been preserved for appeal; arguments raised for the first time on appeal are not considered. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004). Because her argument was not preserved, we do not consider it.

Affirmed.

GLADWIN and CRABTREE, JJ., agree.