ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION IV

CA06-118

September 27, 2006

RONALD E. GROVER
APPELLANT

AN APPEAL FROM JOHNSON COUNTY CIRCUIT COURT
[DR2004-9]

V.

HON. DENNIS C. SUTTERFIELD, JUDGE

VALARIE K. GROVER
APPELLEE

REVERSED AND REMANDED WITH INSTRUCTIONS IN PART;
AFFIRMED IN PART

Appellant Ronald Grover and appellee Valarie Grover[1] were divorced by decree of the Johnson County Circuit Court on August 10, 2005. Appellant appeals from portions of the decree. He argues that the circuit court erred in invalidating a previous reconciliation agreement between the parties. He also argues that the circuit court erred in awarding custody of the parties' minor son to appellee in light of testimony that the child wished to live with appellant. Because the circuit court misapplied the law when it set aside the parties' reconciliation agreement, we reverse that portion of the decree and remand this case for entry of an order consistent with this opinion. We affirm the circuit court's custody determination.

Factual and Procedural History

The parties were married on December 26, 1990. Two children were born of the marriage: Kyle (born October 12, 1989), and Madison (born September 7, 1996). Appellant

[1]Some documents refer to appellee as "Valarie Grover," while others refer to her as "Valerie Grover." Both the complaint for divorce (filed by appellee) and appellee's brief refers to her as "Valarie Grover." Accordingly, we refer to appellee as "Valarie Grover."

is also the father of a third child, Jessica (born February 6, 1987). According to testimony at trial, the parties met while appellant was stationed at Little Rock Air Force Base in December 1987 or January 1988. Appellant was later transferred to Germany, and appellee followed in May 1989 while pregnant with Kyle. The parties later moved to Florida and were married. The parties separated in July 1993, and appellant filed for divorce. However, the parties decided not to pursue the divorce. On March 28, 1994, they signed the following agreement:

> WHEREAS, the parties, [Appellant and appellee], have reconciled their marital differences and no longer desire to proceed with the dissolution of marriage action.
>
> NOW, THEREFORE, it is agreed and stipulated as follows:
>
> 1. [Appellee] hereby waives any right, title or interest she may have to [appellant's] military retirement*, now or in the future*.[2]
> 2. [Appellee] hereby agrees to quit-claim her interest in the parties' marital home . . . to [appellant].
> 3. [Appellant] hereby agrees to hold [appellee] harmless for any and all debts and liabilities associated with the marital home.
> 4. This Agreement constitutes the entire agreement between [appellee and appellant] and supersedes any prior understandings or written or oral agreements or representations between the parties respecting the within subject matter. It shall not be amended, altered, or changed except by a written agreement signed by the parties hereto.

Appellee testified that she moved back to Arkansas when appellant filed for the first divorce. During that time, she had custody of Kyle, while Jessica moved to her grandmother's residence in St. Petersburg, Florida. She stated that when she returned to Florida, she and appellant went to appellant's attorney's office, where she signed the agreement. She testified that appellant conditioned the reconciliation upon her signing the agreement and that had she not signed the agreement, she would have been forced to return to Arkansas. Appellee also testified that she agreed to sign the reconciliation agreement only after appellant agreed to get counseling and move back to Arkansas. She stated that her

[2]The emphasized portion was handwritten and initialed by appellee.

attorney never saw the agreement and that appellant did not give her a list of his assets or tell her the approximate value of his military retirement. The parties moved from Fort Walton Beach, Florida, in 1997, and appellee reminded appellant about his agreement to move to Arkansas and to participate in counseling. Appellee testified that appellant might have attended a couple of counseling sessions with Kyle, but that he otherwise did not attend any counseling. After the reconciliation, Jessica returned to live with the parties.

Appellee testified that she attended dental hygiene school in Pensacola, Florida, and that the family moved to England[3] in 1997 due to a military transfer. She stated that she could have worked but that she chose not to do so because Madison was young. The family moved to Travis Air Force Base in California in the summer of 2000 and remained until November 2000, when appellee's father was in an accident. Appellee testified that she returned to Arkansas in January 2002. The military was not allowing anyone to retire at that time due to the September 11 attacks; therefore, appellant stayed in California while appellee and the children returned to Arkansas. Appellant retired from the military in October 2002, but he took a government contract job in the Middle East in December 2002. He returned to the United States in December 2003. Appellee testified that, when appellant returned, he went to his mother's house in Florida and did not contact appellee for four days. She stated that appellant came back to the parties' home in Arkansas but left again January 5, 2004, stating that he was going to get a divorce. She stated that appellant left Arkansas again but returned the following March to get Jessica.

Regarding custody of Kyle, appellee testified that he would be better off living with her because he finally had a chance to stabilize. She noted that Kyle had been in Arkansas since the seventh grade and that he earned good grades, while he had not in the past. Appellee also thought that Kyle should stay in a small school, which would not happen if he

[3]The country, not the city in Lonoke County, Arkansas.

moved to Panama City, Florida, to live with his father. She noted that Kyle had two years left in school and was a "reserved young man." Appellee also did not want Kyle separated from Madison.

Appellant testified that he was in the military from September 1980 to December 2002. He noted that he had been taking classes at Embry Riddle near Panama City, Florida, since January 2004 and that he takes classes whenever he can afford them. Regarding the marital home in Florida, appellant testified that he thought his attorney took care of the paperwork to quitclaim appellee's interest to him. He did not know whether appellee's name was still on the home. He noted that the agreement between the parties asserted that the two "[had] reconciled their marital differences." Appellant testified that appellee had not moved from Arkansas when she signed the agreement. He stated that when appellee would visit, she would stay in his house, the two would sleep in the same bed, and they would go out together. He testified that appellant had been in Florida for one day prior to signing the agreement and that her belongings were still in Arkansas at the time.

Appellant testified that he last had the children during the previous spring break, Thanksgiving, and summer, and that the visits went well. Appellant stated that he worked during the day and that when he worked at night, his girlfriend watched the children. While the children visited him, they would go bowling, go to the beach, carnivals, and the fair.

On cross-examination, appellant testified that Jessica came to live with him after he came to Arkansas for a court date. He stated that he was in a hotel in Memphis, ready to leave the next morning, when he received a phone call from appellee, stating, "I don't care where you're at, but you better come back here and pick up your daughter." He stated that appellee met him in the middle of the school day with her vehicle full of garbage bags. Appellant testified that Jessica had been in Florida since then, had graduated from high school, and was about to move into an apartment with her friends. Regarding the

reconciliation agreement, he stated that the agreement was a safeguard that he and appellee put together in his attorney's office. He stated that appellee's attorney was involved in the meeting through telephone contact. Appellant testified that appellee had not moved to Florida at that point and that she had to return to Arkansas to pick up some of her things. He also stated that there is nothing written in the agreement regarding counseling or moving away from Fort Walton. Appellant also testified that he wanted custody of Kyle because he would get a stable household. He stated that Kyle was generally depressed but that Kyle was happy around him.

Kyle testified that he had recently completed the tenth grade and had been living in Arkansas since the seventh grade. He said that he wanted to stay with appellant because he wanted to spend more time with him. He also testified that while he was with appellant over spring break, appellant worked during the day and went to school at night. When appellant was away, either appellant's girlfriend or Jessica would watch him and Madison. Kyle also said that Madison would stay with appellee and that, while the two fight, he would miss her. When examined by the court, Kyle acknowledged that he was not far from his high school graduation and that, if he moved, he would not be able to graduate with the students he knew in Arkansas. He stated that if he had to remain in Arkansas, he would not want to do anything and would stay to himself because he would feel bad. He also noted that he would be both happy and sad if the court awarded custody of him to appellant. He said that he would be sad because he would not get to see his sister. Kyle told the court that there would be a downside to either decision made by the court, but the worse situation would be staying in Arkansas.

In a letter opinion dated June 15, 2005, the circuit court awarded appellee custody of Kyle. The trial court noted Kyle's preference to live with appellant; however, it concluded that the preference was not strongly held. It found that Kyle's reasons for wanting to be with

appellant were not convincing reasons for removing him from the physical custody of appellee, who had been his primary caretaker since his birth. Finally, the court noted that appellee had provided Kyle with stability and that his education and emotional needs were being met. Regarding the reconciliation agreement, the court observed that at first glance the agreement appears to be valid; however, it stated that Florida law allows the court to set aside such an agreement if it is "patently unfair," and declared the agreement to be "so unfair as to be shocking." It opined that the agreement was executed more in contemplation of divorce rather than in encouragement of reconciliation and that the agreement was so one-sided as to make it patently unfair. Accordingly, the court awarded appellee an undivided one-half interest in the marital home in Florida and one-half of 12/22 interest in appellant's military account. The court's findings were incorporated into an order entered August 10, 2005.

Standard of Review

We review traditional cases of equity, such as domestic relations proceedings, *de novo*. *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). We review the lower court's findings of fact and affirm unless those findings are clearly erroneous or clearly against the preponderance of the evidence. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003); *Powell v. Powell*, 82 Ark. App. 17, 110 S.W.3d 290 (2003). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Cole v. Cole*, *supra*. In reviewing the lower court's findings, we give due deference to the circuit judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000). Our deference to the circuit court is greater in custody-determinations, as a circuit court charged with deciding a question of child custody must utilize to the fullest extent all of its powers of perception in evaluating the witnesses, their testimony, and the child's best interest. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422

(2001).

Reconciliation Agreement

First, appellant argues that the circuit court erred in voiding the reconciliation agreement between the parties. He contends that the agreement was valid and that appellee failed to prove any of the grounds required to set aside the agreement and urges this court to reverse the circuit court's decision. Appellee argues that the agreement was entered into through fraud, was patently unfair, and was abandoned by the parties.

Both parties agree that Florida law should govern the validity of the agreement. They cite *Ducharme v. Ducharme*, 316 Ark. 482, 872 S.W.2d 392 (1994), which states that in choice-of-law matters for contract disputes, the law of the state with the most significant relationship to the issue at hand should apply. Here, the first divorce was filed in Florida, the agreement was signed in Florida, and at least appellant was living in Florida.[4]

Both the circuit court and appellee start their analysis of the issue by looking at *Cox v. Cox*, 659 So. 2d 1051 (Fla. 1995); however, *Cox* is inapplicable to the present case. In *Cox*, the Florida Supreme Court addressed the effect that reconciliation or remarriage has on a previous property settlement agreement or separation agreement. The court held that reconciliation or remarriage abrogates executory provisions of the previous agreement, but that executed provisions of the agreement are unaffected. Both the circuit court and appellee cite *Cox* for the proposition that a reconciliation agreement may be set aside on one of two bases: (1) fraud, duress, misrepresentation, undue influence, coercion, concealment, or lack of knowledge in its procurement; or (2) the agreement is patently unfair. However, these caveats have nothing to do with the Florida court's final ruling. Rather, they were recommendations made by one of the parties as to what caveats should be placed on the

[4]We note the conflicting testimony regarding whether appellee had moved to Florida or was merely visiting appellant in Florida when the parties signed the agreement.

enforceability of a prior marital settlement agreement. The *Cox* court never addressed reconciliation agreements entered into after parties agree not to pursue a divorce.

By misapplying *Cox*, the circuit court erred when it set aside the parties' reconciliation agreement solely based upon a finding that it was "patently unfair." Under Florida law, even unfair agreements may be valid and enforceable.

A correct statement of Florida law regarding setting aside postnuptial agreements is found in *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987). Under Florida law, a spouse may set aside or modify a postnuptial agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching. *Id.* Overreaching is defined as "that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties." *Schreiber v. Schreiber*, 795 So. 2d 1054, 1057 n.3 (Fla. Ct. App. 2001) (citing *Black's Law Dictionary* 1104 (6th ed. 1990)). Even though an agreement is one-sided and unfair, that alone does not make it the result of overreaching absent a showing that the agreement resulted from an inequality of bargaining power or other circumstances such that there was no meaningful choice on the part of the disadvantaged party. *Id.* "[O]verreaching involves the situation where one party, having the ability to force the other into an unfair agreement, does so." *Id.* at 1057.

In the alternative, the spouse may seek to set aside a postnuptial agreement on the basis that the agreement is unfair or unreasonable, given the circumstances of the parties. *Casto v. Casto*, *supra*. To establish unreasonableness, the party seeking to set aside the agreement must show that the agreement does not adequately provide for the challenging spouse and, consequently, is unreasonable. *Id.* However, this does not end the court's inquiry. Once the challenging spouse establishes that the agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a presumed

lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached. *Id.* This presumption may be rebutted by the defending spouse by showing that (a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income of the parties, or (b) a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties. *Id.* The *Casto* court recognized that parties to a marriage are not dealing at arm's length and that they may enter into bad fiscal agreements for any reason; however, "[i]f an agreement that is unreasonable is freely entered into, it is enforceable." *Id.* at 334; *see also Waton v. Waton*, 887 So. 2d 419 (Fla. Ct. App. 2004).

Further, in *Macar v. Macar*, 803 So. 2d 707 (Fla. 2001), the Florida Supreme Court announced that, when challenging a settlement agreement entered into after the commencement of litigation and the utilization of discovery procedures, a party seeking to set aside a settlement agreement must challenge the settlement under Fla. R. Civ. P. 1.540 (similar to Fed. R. Civ. P. 60), which would only allow for the agreement to be set aside in light of evidence of fraud or in light of newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial or rehearing. If *Macar* governs, the *Casto* framework is inapplicable.

While this court performs a *de novo* review of the record, it is sometimes necessary to remand a case to the circuit court for a determination of the parties' rights. *Rigsby v. Rigsby*, 346 Ark. 337, 57 S.W.3d 206 (2001). This is particularly the case "when the [circuit] court has tried the case on the wrong legal theory and where we cannot plainly see what the rights and equities of the parties are." *Id.* at 343, 57 S.W.3d at 211 (quoting *Henslee v. Kennedy*, 262 Ark. 198, 210, 555 S.W.2d 937, 943 (1977)). This is one of those cases where

the equities are unclear, warranting remand. If appellant's testimony is fully believed, appellee entered into the reconciliation agreement while represented by counsel, and the agreement, as one-sided as it is, may be enforceable. If appellee's testimony is fully believed, appellee was presented the agreement under circumstances possibly constituting duress. *Accord Hjortaas v. McCabe*, 656 So. 2d 168 (Fla. Ct. App. 1995) (setting aside a prenuptial agreement on the grounds of duress when the wife was presented with document for first time two days before the wedding, the actual terms of the agreement were previously unknown to her, and the agreement contained no information about the husband's finances).[5] Accordingly, we reverse the circuit court's order to the extent that it set aside the reconciliation agreement and remand this case for entry of an order consistent with this opinion.[6]

Custody of Kyle

Next, appellant argues that the circuit court erred in awarding custody of Kyle to appellee. He contends that the circuit court should have awarded him custody of Kyle in light of Kyle's stated preference to live with appellant. It is well-settled that trial courts are to award custody "solely in accordance with the welfare and best interest of the child," with all other considerations secondary. Ark. Code Ann. § 9-13-101(a)(1)(A) (Supp. 2003); *see also Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001); *Hickman v. Culberson*, 78 Ark. App. 96, 78 S.W.3d 738 (2002). The attitudes and wishes of the child, although not controlling, are proper for the consideration of the court in making an award of custody. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998). Further, it is proper for the circuit court to consider the goal of

[5]For the same reason, we cannot determine the validity of appellee's argument that the parties essentially abandoned the reconciliation agreement.

[6]The facts regarding the execution of the reconciliation agreement were sufficiently developed at trial.

keeping siblings together. *Freshour v. West*, 334 Ark. 100, 971 S.W.2d 263 (1998). However, an award of custody based solely upon the presumption that siblings should remain together is contrary to the law. *Atkinson v. Atkinson*, 72 Ark. App. 15, 32 S.W.3d 41 (2000). Finally, the fact that a parent has been the primary caretaker, while not determinative, is also relevant and worthy of consideration. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). The circuit court can consider several factors in making a custody determination, as long as the polestar of that decision remains the best interests of the child.

We affirm the circuit court's decision to award custody of Kyle to appellee. True, appellant presented evidence that would support an award of custody to him: Kyle stated a preference toward appellant, and appellant has maintained contact with his children. However, to reverse the award of custody in this case would be to completely disregard the evidence in this case supporting the award: Kyle's living situation is stable and has been for the previous four years, and an award of custody would separate him from his little sister and from his mother, who has been Kyle's primary caretaker his entire life. Finally, the record indicates that the circuit court fully considered Kyle's preference and, as Kyle noted in his testimony, he will experience negatives no matter which parent has custody. The circuit court's award of custody to appellee, despite Kyle's stated preference, is not clearly erroneous.

Reversed and remanded with instructions in part; affirmed in part.

VAUGHT and ROAF, JJ., agree.