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

DIVISION III

CA06-1432

June 13, 2007

JONAH BISHOP APPELLANT	AN APPEAL FROM BENTON COUNTY CIRCUIT COURT [DR2006-573-4]
V.	HON. JOHN R. SCOTT, JUDGE
EYDIE FORD APPELLEE	AFFIRMED

Jonah Bishop appeals from an order awarding custody of his son, Keenan Bishop, age six, to appellee Eydie Ford, Keenan's mother. Appellant asserts that the trial court erred in granting appellee custody because she is a long-time marijuana user who admitted that she would smoke marijuana with Keenan if he was interested, because appellant can offer Keenan a better quality of life and a closer relationship with his relatives, and because appellant has "taken the lead in meeting Keenan's health needs." We hold that the trial court did not err in awarding custody to appellee; therefore, we affirm the trial court's custody order.

Factual Background

Appellant and appellee were never married but they lived together in Bella Vista until shortly before Keenan was born (August 29, 2000). Appellant ended the relationship with appellee when she was eight months' pregnant with Keenan, but he executed an affidavit of paternity and was listed as Keenan's father on the child's birth certificate. Approximately one week after Keenan was born, appellant moved to Pittsburg, Kansas, where his parents live.

The parties signed a written "agreement" sharing custody of Keenan, with custody rotating on a weekly basis. The exchanges were made in Joplin, Missouri.[1] Either appellant or his wife provided health insurance for Keenan; the parties shared the medical expenses that were not covered by insurance. Keenan attended day care while in each parent's care. Most of his medical appointments were in Pittsburg. Appellant claimed Keenan as a tax dependent but gave appellee the refund check every other year.

By all accounts, this arrangement worked well until the time came to decide where Keenan would attend kindergarten. In 2005, the parties disagreed on where Keenan should attend school so they mutually agreed to keep Keenan out of school for another year. Subsequently, appellee refused to allow Keenan to attend school at Pittsburg, as appellant desired. On April 7, 2006, appellant filed a petition to establish paternity and to obtain custody of Keenan. The grounds asserted in this petition were that 1) Keenan was now of school age and the custody arrangement was no longer viable; 2) appellant was the fit and proper parent to have primary custody; 3) appellant has always been responsible for Keenan's medical treatment because even when Keenan became ill in Arkansas, appellee brought him to Pittsburg to receive treatment; 4) Keenan desired to attend school in Pittsburg; and 5) appellant believed that appellee used marijuana. In reference to this last ground, appellant requested that the court set an immediate hearing on his "request for a hair-follicle test."

Appellee responded, generally denying the allegations but admitting that appellant's name appeared on Keenan's birth certificate. Without waiting to be compelled by a court order, appellee voluntarily took a hair-follicle test on April 25, 2006, which was negative.

The hearing was held on August 14, 2006. In sum, the testimony of appellant,

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[1]Pittsburg, Kansas is approximately eighty-seven miles from Bella Vista. Joplin, Missouri is approximately fifty-five miles from Bella Vista, but only thirty-one miles from Pittsburg.

appellee, and appellant's wife, Deanna, established that the parties have been unusually cooperative in implementing the custody arrangement and it appears that Keenan has thrived due to his parents' care. Each parent credits the shared arrangement for Keenan's healthy development. Each parent is employed and has an adequate income; appellant is a tooling engineer who works for his father's business and appellee is a hair-stylist who operates as an independent contractor. Each has an appropriate home and each has enrolled Keenan in pre-school or day care and thus, neither has been a "stay-at-home" parent. Each parent has cooperated with the weekly exchanges. Moreover, Deanna, appellant's wife of four years, has known Keenan since he was approximately one year old, and has a good relationship with Keenan and with appellee. She is the primary person who schedules Keenan's doctor's appointments, takes him to the doctor, and handles the paperwork relevant to his medical expenses.

The trial court orally ruled that appellant was a fit parent and had assumed his responsibilities toward Keenan by providing care, supervision, protection, and financial support. The court also commended the parents and found that "there has been no harm or injury to this child and that he is well-cared for and [is] going to start kindergarten this week. The parties have conducted themselves as I encourage parents to do." The court noted that there had been no complaints regarding Keenan's care or regarding either parent's home environment.

The court appreciated appellee's candid admission that she has used marijuana approximately for eleven years. She said she began using again approximately six months after Keenan was born and that she used marijuana one time each month "if that" because it is "relaxing." Appellee said that her brother had supplied her with the drug and that she has used it with her brother. Appellee also admitted that she told appellant in 2005 that if Keenan was interested in smoking marijuana, that she would smoke it with him. She also admitted

that she took one drag off of a marijuana joint the weekend after she received the paternity petition. However, appellee denied using marijuana when Keenan was at her house and said that Keenan had never been in her brother's presence unsupervised. She said that during 2005, she used marijuana "once in a great while." She also said that she stopped using marijuana in January 2006, except for the weekend after she received the paternity petition.

Appellee explained that when she told appellant that she would smoke marijuana with Keenan, she assumed that her son would not approach her until he was at least eighteen and that she believed that it was a "better plan" to have Keenan smoke pot at home with his mother than "at a party or doing something stupid." Appellee clarified that if Keenan approached her at thirteen or fourteen, she would tell him that it was wrong and not to do it.

The trial court found that there was no evidence or even testimony that appellee or anyone else had used drugs in front of Keenan or that appellee's drug usage had been an immediate detriment to Keenan. It noted that appellee passed the hair-follicle test requested by appellant, which showed that she had been (essentially) drug-free for the last ninety days.

The court also considered appellant's argument that he had a "superior environment" based on his marriage and close family contacts. However, the court determined that "there is no indication that such a situation is a detriment to the minor child" and noted that each parent engaged in activities with Keenan. Further, it gave credence to appellee's testimony that Keenan's early healthcare needs were met in Arkansas and that appellee has made arrangements to see that his current healthcare needs are met in Arkansas.

In awarding custody to appellee, the court noted:

> Such a decision is always difficult but I am more than satisfied that the parties are mature, responsible parents and will continue to love, nurture, and raise this child to be a valuable contributing member of society, which will require your continued communications with each other as a demonstration of your love for your son.

The court awarded appellant visitation, ordered him to pay child support, and incorporated its oral findings in a written order that was entered on August 24, 2006. Appellant now appeals only the trial court's decision regarding custody.

Standard of Review

The standard of appellate review governing custody awards is well-settled. In child-custody cases, the primary consideration is the welfare and best interests of the child involved; all other considerations are secondary. *See Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). In cases involving child custody and related matters, we review the case de novo, but we will not reverse a trial judge's findings in this regard unless they are clearly erroneous. *Id.* 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.* Because the question of whether the trial 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. *Id.*

Discussion

When a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until the child reaches the age of eighteen years unless a court of competent jurisdiction enters an order placing the child in the custody of another party. Ark. Code Ann. § 9-10-113(a) (Supp. 2005). Where the father establishes paternity, the court may award custody to the biological father upon a showing that he is a fit parent to raise the child, that he has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and that it is in the best interest of the child to award custody to the biological father. Ark. Code Ann. § 9-10-113(b),(c).[2]

[2]Act 654 of 2007 amended this statute to change the title from "Custody of Illegitimate Child" to "Custody of Child Born out of Wedlock." This amendment also added a

Factors that a court may consider in determining what is in best interest of child include the psychological relationship between parents and the child, the need for stability and continuity in child's relationship with parents and siblings, the past conduct of parents toward the child, and the reasonable preference of child. *Rector v. Rector*, 58 Ark. App. 132, 947 S.W.2d 389 (1997).

Appellant raises the same arguments that he raised below: he should have been awarded custody due to appellee's drug usage, because of his superior support system, and because he has functioned as Keenan's primary parent when it comes to providing healthcare for the child. Because we disagree, we hold that the trial court did not err in awarding custody to appellee.

Certainly, a parent's use of drugs is a relevant factor for a trial court to consider when awarding custody. *See Rector*, *supra*. However, the mere fact that a parent has used an illegal drug, itself, does not preclude a finding that it is in the child's best interest to award custody to that same parent. *See Cranston v. Carroll*, 97 Ark. App. 23, — S.W.3d — (2006); *Rector*, *supra*. Essentially, the trial court's custody determination here was based on credibility findings, which we will not disturb on appeal. *See Dansby*, *supra*.

First, as to appellee's marijuana usage, the evidence demonstrates that Keenan has not been harmed in any respect by appellee's occasional drug usage, and that appellee had stopped using at the time of the hearing. Appellant has not alleged that his son has been harmed by appellee's conduct or that appellee or her brother or anyone has used drugs in front of Keenan. He does not even allege that Keenan is *aware of* appellee's drug usage. In fact,

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subsection (d), which states, "When in the best interest of a child, visitation shall be awarded in a way that assures the frequent and continuing contact of the child with the mother and the biological father." However, the order in this instant case was entered before this amendment took effect, so the trial court made no findings related to subsection (d).

appellant's questioning of appellee in 2005 regarding how she was going to handle the situation confirms that, at that point, Keenan was not aware of the situation. Significantly, appellant undisputedly knew that appellee used marijuana but never objected to her conduct until she refused to allow Keenan to attend school in Pittsburg. When he asked her to take a drug test, she did so, and passed it.

The trial court apparently credited appellee's testimony that she stopped using marijuana in January 2006. Further, the trial court apparently credited appellee's explanation that she would not use marijuana with Keenan while he was a minor, and that she would tell him that it was wrong and not to do it. Any argument premised on the fact that appellee "might" use drugs with her son in the future would be based on speculation, and thus, cannot support reversal.

Appellant's latter two arguments are also quickly dismissed. Appellee concedes that appellant's parents have a closer relationship with Keenan than do her parents. It also is undisputed that Deanna also takes care of Keenan and that Keenan has been involved in more organized activities while in appellant's care. However, both parents engaged in leisure activities with Keenan and it appears that only appellee has helped to prepare Keenan for kindergarten.

Moreover, no evidence was presented to show that appellee prevented Keenan from interacting with her parents or with other children, or that she was unable to meet Keenan's physical, social, psychological, or educational needs with her current style of living. To the contrary, appellant had no complaints about his son's development while in appellee's care until she refused to allow him to attend school in Pittsburg.

Similarly, the evidence does not support that appellant has been the primary parent providing for Keenan's healthcare. While appellant or his wife provided insurance for Keenan, it should not be ignored that appellant also moved away from his son when the infant

was one week old, which forced appellee to make a three-hour round trip commute to Pittsburg in order to participate in her son's medical treatment. Further, by appellant's own testimony, despite the substantial commute, appellee has attended approximately the same number of appointments as appellant has attended and has attended even more appointments for minor issues. Additionally, both appellant and appellee have relied on Deanna to make Keenan's appointments, pick him up from daycare, and handle his paperwork. Finally, the evidence supports that Keenan's medical needs will be met in Arkansas: Keenan has received crucial medical treatment in Arkansas, such as all of his inoculations and his physical for school, appellee has obtained medical insurance on Keenan, which was effective before the hearing took place, and she has transferred some of his medical records.

In short, appellee's prior, occasional marijuana use, and the fact that she is single and does not have a close relationship with her parents has not affected her ability to fully function as Keenan's mother. To the contrary, she has been just as active as appellant, if not more, in overseeing Keenan's physical, social, psychological, and educational development. Given that Keenan is a healthy, well-adjusted child, in substantial part, due to appellee's guidance and care, and given that her conduct and lifestyle have not harmed the child, the trial court did not err in awarding custody to appellee.

Affirmed.

HART and GLOVER, JJ., agree.