ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION III

CA07-09

September 12, 2007

NICOLE RENEE ANDERSON
APPELLANT

V.

LUKE DAVID ANDERSON
APPELLEE

APPEAL FROM THE BOONE COUNTY CIRCUIT COURT
[DR-05-107-1]

HON. ROGER V. LOGAN, JR., CIRCUIT JUDGE

AFFIRMED

The sole issue on appeal in this divorce case is custody of the parties' minor child. During the pendency of the divorce proceeding, appellant Nicole Anderson had temporary custody of the child. However, after extensive consideration of the issue, the trial court awarded Luke Anderson custody and ordered appellant to pay child support. It is from this decision that Ms. Anderson appeals. Luke Anderson did not file an appellee's brief.

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*, *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 employ—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).

Joint custody or equally divided custody of minor children is disfavored in Arkansas; however, Arkansas Code Annotated section 9-13-101(b)(1)(A)(ii) as amended in 2003 specifically permits the court to consider such an award. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). Equally divided custody of minor children may be ordered where the circumstances clearly warrant it; if it is shown that the interest of the child is better fostered by divided custody, we have held that this is a proper order for a court to make. *Hansen v. Hansen*, 11 Ark. App. 104, 666 S.W.2d 726 (1984). A crucial factor bearing on the propriety of joint custody is the parties' mutual ability to cooperate in reaching shared decisions in matters affecting the child's welfare. *Dansby*, *supra*.

Our law is well settled that the primary consideration in child custody is the child's best interest at the time of the final hearing as demonstrated by the record. *Hobbs v. Hobbs*, 75 Ark. App. 186, 55 S.W.3d 331 (2001). The time for parties to demonstrate the mutual ability to cooperate in reaching shared decisions in matters affecting a child's welfare so as to justify an

award of joint custody is before the hearing that is the basis of the joint-custody award, not some later time in an unknown future based on unproven facts. *Id*.

In this case, the trial court recognized that neither parent was perfect but that each parent was concerned about the child and would be a fit parent. The court fairly assessed each of the parties' faults—the child's father had a history of either underemployment or unemployment, and the child's mother had a history of prescription-drug addiction. However, the court was impressed by the father's stable home environment and the fact that at the time of the hearing he was actively employed. Further, the court noted that the father was assisted in his child-rearing duties by his mother—the child's paternal grandmother—who had taken a great interest in the child's welfare.

In its order, the court took specific note of the fact that the mother conceded "that the father was a good dad" and at one time had asked him to return early from an out-of-state trip because "she could not handle the child." The court also noted that while the evidence showed the mother "loved her daughter with all of her heart," it also showed "she was just not the mothering type and that she did not want more kids." By way of example, the court found it to be "remarkabl[e]" that the "credible" testimony of the child's paternal grandmother established that the mother never changed the child's diaper when the grandmother was around the child (which was quite often). Also, evidence was introduced that the child's father performed most of the day-to-day care of the child. The court noted that on Saturdays and Sundays when the days the child's mother was not working she would sleep until 2:00 or 3:00 p.m. and leave the child in her father's care. The court also found that

the child's mother had become romantically involved with other men after the divorce and had exercised questionable judgment in relation to an online romance.

Finally, the court found that although the parents had originally cooperated as to visitation and the needs of their child, in the months preceding the hearing the child's mother had used the child for leverage and wrongfully withheld visitation from the father. After much deliberation, the trial court ruled out the possibility of joint custody, noting that such an arrangement would not be permitted under our case law, which disfavors joint custody—except under the most ideal of circumstances. As such, the court ultimately found that the child's father had demonstrated he could meet the child's needs, especially with the willing assistance of the child's paternal grandmother, and ordered permanent custody to be placed in the father based on the child's best interest.

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

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.