

ARKANSAS COURT OF APPEALS

DIVISIONS I & II

No. CA07-1321

ANDREA HICKS

APPELLANT

V.

JOSHUA A. COOK

APPELLEE

Opinion Delivered November 19, 2008

APPEAL FROM THE CHICOT
COUNTY CIRCUIT COURT,
[NO. DR-2007-19-2]

HONORABLE ROBERT C.
VITTITOW, JUDGE

DISSENTING OPINION ON DENIAL
OF REHEARING

JOSEPHINE LINKER HART, Judge

I dissent from this court's denial of rehearing. As the appellant points out, this court committed a clear error by ignoring the obvious fact that the trial judge based his change-of-custody decision in large part on his finding that the appellant was a participant in some nefarious "cult." The majority was wrong to ignore the clear indication that the trial judge was so influenced. As I pointed out in my dissent, after the appellee interjected the accusation that the appellant practiced Wicca, the trial judge interjected himself into the proceedings and began interrogating the appellant about that practice. If that was not a clear indication that the trial judge was extraordinarily concerned about the possibility that the appellant was practicing Wicca, it was certainly confirmed beyond any doubt by the fact that the trial judge made an explicit finding to that effect in his written order.

As I stated in my dissent, even if it were proven that the appellant was a practicing

Wiccan, that conclusion can have no bearing on the decision to change custody. The majority makes a clear mistake of fact because there is absolutely no evidence that practicing Wicca was in any way harmful to the child or even that there were any practices conducted in the child's presence. Accordingly, this cannot be a reason for changing custody. The majority made a clear error of law by not holding that this case is controlled by *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003) (reversing a custody award based on "perceptions and appearances rather than concrete proof of likely harm").

Finally, I am compelled to mention that the appellee's intemperate response to the appellant's rehearing petition was not only inappropriate but was vile and slanderous. He argues, among other things, that the majority was correct to allow the trial court to make a custody decision based on his perception of the appellant's religious beliefs because not all religions are worthy of constitutional protection. He denigrates Mormons, asserting that "Mormons practice incest and child marriages," and proclaims that "Wicca is a cult, not a religious belief." He admonishes that "this court is committing a grievous error if it allows cult activities to be protected" and that the "trial judge appropriately ruled in this case after carefully considering the facts." In light of the appellee's further illumination of this issue, I simply cannot say that the trial court's decision was "appropriate." I lament that this court has accepted the appellee's invitation to embark on a grand inquisition.