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

DIVISION I

CA07-923

May 28, 2008

TAMMY DAWN CHANDLER
APPELLANT

V.

THOMAS CHANDLER
APPELLEE

AN APPEAL FROM THE BENTON COUNTY CIRCUIT COURT
[DR2006-1485-5]

HON. XOLLIE DUNCAN, JUDGE

AFFIRMED

Tammy Chandler appeals from a divorce decree awarding custody of two of her children to her ex-husband, appellee Thomas Chandler, and awarding appellee visitation with his stepson. She urges numerous grounds for error in the circuit court's award of custody, but generally argues that the court 1) failed to make specific findings regarding the children's best interests, and 2) ignored any evidence relating to appellee's alcohol abuse and other failings as a parent, while "punishing" her by faulting her conduct and awarding custody of the children to appellee. She also argues that the circuit court erred in awarding appellee visitation with his stepson because it failed to first make a specific finding that appellee acted *in loco parentis* to the child. We disagree and affirm the award of both custody and visitation.

I. Facts

Prior to appellant's marriage to appellee, she was married five times and had a son, Daniel Davis, d.o.b. September 8, 2000. She and appellee married in 2003 and divorced in 2007. Two children were born of the marriage: Keyton Chandler, d.o.b. September 15, 2003, and Kayla Chandler, d.o.b. February 13, 2006.

The parties lived in Benton County during their marriage. Due to appellee's alcohol abuse and violent temper, appellant left him, with the children, on September 8, 2006, and moved to a women's shelter in Harrison, Arkansas. She also obtained a temporary protection order, which was later lifted between the temporary hearing and the final hearing in this case. Appellee filed for divorce on September 19, 2006, requesting custody of all of the children, including Daniel.

A temporary hearing was held on January 24, 2007, during which the circuit court awarded appellant temporary custody of the three children. After hearing testimony regarding appellee's alcohol consumption, the court prohibited appellee from having alcohol in his home or consuming it in front of the children. After hearing testimony that appellee struck Daniel in the mouth on one occasion, the court prohibited the parents from administering corporal punishment. It also ordered the parents not to have single members of the opposite sex around the children. It specifically ordered appellant to keep single men away from the children, in reference to Vince Hammer, whom she met one month after she and appellee separated.

The final hearing was held on April 25, 2007. Generally, appellant painted herself as the primary caretaker who did no wrong and painted appellee as a violent, habitual drunk who drank in front of the children and spent very little time with the family. Appellant conceded that Keyton and Kayla would see their father because "they're his children and he has a right to see them." However, she requested that appellee not be allowed to have visitation with Daniel due to the fact that appellee is not Daniel's father, appellee's alcohol abuse, and appellee's single incident of physical abuse of Daniel.

Appellee, on the other hand, expressed concern with appellant's instability because she changed jobs and residences often and because she had difficulty managing all three children at once. He also requested the right to visit Daniel, and presented witnesses who essentially

testified that he and Daniel have a father–son relationship.

The circuit court awarded appellee a divorce. It also awarded custody of Keyton and Kayla to appellee and allowed appellee to retain the marital home. It further ordered appellee to exercise visitation with Daniel, so that Daniel's visitation would coincide with appellee's "custody time" with Keyton and Kayla, even during the summer and on holidays.

The parties were prohibited from administering corporal punishment and from using alcohol in the presence of the children or having evidence of alcohol in the home (such as empty beer cans) while the children are present. They were further ordered to take parenting classes geared for children of similar ages to Keyton and Kayla. Appellant now appeals from the custody and visitation award.

II. Custody

We review domestic–relations cases *de novo* on the record, but will not reverse a circuit court's findings of fact unless they are clearly erroneous. *See Robinson v. Ford-Robinson*, 362 Ark. 232, 208 S.W.3d 140 (2005). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* We give due deference to the superior position of the circuit court to view and judge the credibility of the witnesses. *Id.* This deference is even greater in cases involving child custody, as a heavier burden is placed on the circuit judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interests of the children. *Id.*

We hold that the circuit court did not err in awarding custody of Keyton and Kayla to appellee. Even if none of the individual factors cited by the court would support the award of custody, when considered cumulatively, they certainly do. Accordingly, we affirm the custody order.

Appellant argues that the circuit court failed to make specific findings regarding the

best interests of the children and that it failed to point to an "exceptional circumstance" that justified dividing custody.[1] However, the statute governing custody determinations does not require the circuit court to specifically list all of its findings. *See* Ark. Code Ann. § 9-13-101 (Repl. 2008). In addition, when the circuit court fails to make findings of fact, we may, under our *de novo* review, conclude that the evidence supported the decision. *See Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

If appellant wanted the circuit court to make more specific findings, she could have filed an appropriate motion under Ark. R. Civ. P. 52(a). As the record stands, a *de novo* review supports that the circuit court's award of custody was not clearly erroneous and was based on the circuit court's consideration of the best interests of the children.

The relevant portion of the custody statute, Ark. Code Ann. § 9-13-101, provides as follows:

> (a)(1)(A)(i) In an action for divorce, the award of custody of a child of the marriage shall be made without regard to the sex of a parent but solely in accordance with the welfare and best interest of the child.
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> ....
>
> (b)(1)(A)(i) When in the best interests of a child, custody shall be awarded in such a

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[1]Appellant further argues that the circuit court ignored the effect on Keyton and Kayla of removing them from the custody of their primary caretaker, the effect of separating Keyton and Kayla from Daniel, and the effect of placing Keyton and Kayla in the custody of an abusive parent. Additionally, she asserts that its finding that she did not support Keyton and Kayla's relationship with appellee was based on an improper consideration. Our *de novo* review of this case reveals that the circuit court neither considered improper factors nor failed to consider any relevant factor in determining the children's best interests.

Appellant also argues that the circuit court's decision was not based on Keyton and Kayla's best interests, but rather, punishes appellant for her conduct. Specifically, she alleges that the court punishes her for: 1) expressing her fundamental right to make decisions concerning the best interests of Daniel; 2) violating the court's temporary order concerning guests of the opposite sex; 3) protecting her children and herself from appellee; 4) the appearance of her home; 5) her relationship history, her friendship with Vince Hammer, and job changes; and 6) her failure to reschedule a doctor's appointment for Keyton. Nothing in the record supports that the circuit court's decision was based on an intent to "punish" appellant.

> way so as to assure the frequent and continuing contact of the child with both parents.
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> ....
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> (2) To this effect, in making an order for custody, the court may consider, among other facts, which party is more likely to allow the child or children frequent and continuing contact with the noncustodial parent....

In determining custody, a circuit court is often faced with a situation where neither parent appears to be "ideal" because each parent's character and ability to care for the children may be questionable. *See Eaton v. Dixon*, 69 Ark. App. 9, 9 S.W.3d 535 (2000). In such a case, where there is no ideal solution available to the circuit court, the court should assess which parent's situation has recently been more stable. *See Eaton*, *id*. The overarching question is whether the circuit court's custody arrangement adequately provides for the welfare or best interest of the children better than any other option then available to the court. *See Respalie v. Respalie*, 25 Ark. App. 254, 756 S.W.2d 928 (1988).

Here, the custody award is supported, first, by the evidence that appellant would not foster Keyton and Kayla's relationship with their father. The court was disturbed that appellant, in essence, testified that Keyton and Kayla "have to" see appellee because, as their father, he has the right to see them, rather than it being in their best interests to see him *because* he is their father. The court was also concerned because appellant wanted to terminate appellee's relationship with Daniel, even though appellant admitted that appellee was the only father Daniel had ever known, even though she consented to have appellee adopt Daniel, and even though other witnesses viewed the relationship between Daniel and appellee as a "father–son" relationship.

The court concluded:

> I just believe, Mrs. Chandler, that you have absolutely no intention of supporting Mr. Chandler's relationship with these children and you have no intention of supporting their relationship with him. Along with everything else I find disturbing in this case, that is just not – it's not giving us anywhere to go. The custodial parent's greatest obligation besides the care of the children is to make sure that relationship with the noncustodial parent not only is allowed to exist but flourishes, and there is absolutely no way you are going to permit that to happen.

As the circuit court concluded, the evidence supports that appellant would not facilitate the relationship between *any* of the children and appellee.[2]

Moreover, the circuit court properly concluded that appellee seemed to be the more stable of the two parties. Contrasting appellant's stability with appellant's behavior, the court stated:

> On the other hand, I have Mrs. Chandler's instability to deal with. She tends to move from place to place. She has had six marriages under her belt now, and she has got a new friend even as we speak. She has had two residences since these parties separated back in September of '06. She has had two jobs and she is now in school. I ordered Vince Hammer not to be around the children and Mrs. Chandler admitted he was there on Friday. She was considering a move back to Benton County, but she changed her mind today. So we have all these problems to deal with. I believe the testimony that Miss Chandler does have some difficulty at times controlling these children. They were living in a filthy house. That basically is the fault of both. There is no excuse for living in filth. The picture of the baby bottles and the mess in the sink, frankly, Mrs. Chandler was at home. She should have been tending to that. I never really heard her give me a good explanation of why the house was like that, but like I said, they both should have been tending to housekeeping a little better than they were.

The court considered the evidence that appellant had moved several times since the parties separated, as well as her unstable job history. Appellant and her children had lived at their current residence for approximately one month before the hearing, which appellant paid for through child support, housing assistance, financial aid from school, and help from her aunt. Yet, after living at her current residence for only one month, she admitted that she thought of moving back to Benton County, even though she had relatives in Harrison, she was in her first semester of school in North Arkansas College in Harrison, and it would take her

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[2]Appellant relatedly argues that, in determining who should get custody of Kayla and Keyton, the circuit court improperly considered the fact that she did not want Daniel to have contact with appellee. She argues that, pursuant to *Troxel v. Granville*, 530 U.S. 57 (2000), the court violated her fundamental right to determine how her child should be raised. However, appellant failed to preserve this argument for appellate review because she did not raise it to the trial court. Even constitutional arguments will not be considered for the first time on appeal. *See Jones v. Arkansas Dep't. of Human Servs.*, 361 Ark. 164, 205 S.W.3d 778 (2005). Moreover, we have rejected the identical argument on similar facts in *Hunter v. Haunert*, 101 Ark. App. 93, ___ S.W.3d ____(2007).

three or four years to complete her studies.

After moving to Harrison, appellant worked at two different jobs before she started school; she insisted that those jobs were meant to be temporary jobs until she started school. In the recent past, however, appellant had also pursued a job performing auto shop repairs; she obtained a CDL license, which she used for only two months; she looked into becoming an LPN, although she never pursued this even after she was accepted into nursing school because she became pregnant; and she also wanted to become a massage therapist.

On the other hand, appellee has lived in the same home for approximately four years. Although he, too, changed jobs several times, his employment history is much more stable, and at one point, he owned his own business for eight years. Appellee has worked at the same place for more than one year – an auto collision shop – and during that time has progressed from temporary to permanent employment. His employer testified that appellee "will be employed there as long as I have a business."

The court also considered appellee's drinking habit. It cited appellee's alcohol use but commented that his last DWI was nine years ago. It observed that appellee did not drink around the children and was able to perform well at his job. The court ordered that there be "no alcohol or evidence of alcohol while the children are present." We are bound by the circuit court's credibility determination that appellee had stopped drinking in front of the children (a finding that appellant does not challenge on appeal).

Additionally, the court recognized that *each parent* has anger and control issues and ordered each parent to take parenting classes geared toward young children. It also prohibited each parent from using corporal punishment. Appellant admitted that on one occasion, when the children were arguing about who was going to use a plastic chair, she picked up the chair and threw it, knocking a hole in the wall of their mobile home. She insisted that she was not angry at the children and that she meant to throw the chair into the bedroom. The court

found that appellant is "extremely flighty" in her behavior, that she is not focused on the children, and that she has trouble managing all of the children.

The court also considered the "filthy" appearance of the parties' home. It was particularly concerned about the dirty dishes, which included dirty baby bottles and nipples, and the stacks of empty beer cans left outside. Appellant admitted that she and appellee agreed that she would take care of the inside of the home and that appellee would take care of the outside, and the court found both parties equally at fault.

Further, the court expressed concern about the fact that appellant failed to seek treatment for Keyton's "lazy eye." Appellant testified that she took Keyton to his first appointment and was told that he needed glasses while watching TV, but that she canceled the next appointment, in January, due to a conflicting court date. Although she had obtained $5000 in assistance for school, and approximately $2500 via her tax return, she testified that she had not rescheduled the appointment because she did not have gas money.

The court apparently did not credit her testimony. It stated:

> You have used it on living expenses, gas, but you have gotten your schooling paid for, your house paid for and your babysitter paid for through public assistance, and this child has no glasses and no appointment. That is very distressing to me that that [sic] for six months has been in limbo. I mean, you told me you thought it was January when you cancelled that child's last appointment, and you haven't even called for a new appointment yet. *I find that to be serious, serious neglect.*

(Emphasis added.)

Appellant insists that her failure to reschedule the appointment, alone, does not support a finding that appellee should have custody. She is correct, but that is of no moment because the court did not base its custody determination *solely* on her failure to reschedule Keyton's appointment. Rather, the court properly weighed appellant's medical neglect as one more factor supporting the overall custody determination. Moreover, it can hardly be said, as appellant argues, that the circuit court *ignored* the evidence that she was the children's primary caretaker where the court in fact, generally weighed the manner in which she cared for her

children *against* her.

Finally, the court considered appellant's failure to comply with its order prohibiting the parties from having members of the opposite sex in the presence of the children. Appellant admitted during the temporary hearing that she had known Hammer since September 2006 (shortly after the parties separated), and that he visited her home when she needed something repaired or when "he wants to come over and see the kids." However, she insisted that they did not have a sexual relationship. During the temporary hearing, the circuit court specifically told appellant: "I don't know what your friendship relationship with Vince amounts to, but you need to keep single men away from the kids right now. They've got a daddy, and that's the daddy they need to know."

Despite this order, at the final hearing, appellant admitted that Hammer had been to her house the previous Friday. By her own testimony, she did not turn Hammer away when he arrrived. Instead, she allowed Hammer to remain while she finished the boys' baths. Appellant concedes that the violation of a court's order is a proper factor to be taken into consideration in determining the best interests of a child. *See Powell v. Marshall*, 88 Ark. App. 257, 197 S.W.3d 24 (2004). At the temporary hearing, the court made it clear that it was concerned with the effect the presence of a single male would have on the children.

In short, giving deference to the circuit court's superior ability to judge the parties' credibility and to weigh the evidence, it cannot be said that an award of custody of Kayla and Keyton to appellant would better provide for the children's best interests than an award to appellee. Accordingly, we affirm the circuit court's custody award to appellee.

III. Divided Custody

Appellant also argues that the circuit court erred in dividing custody of the children because it ignored the effect of separating Keyton and Kayla from Daniel. Her argument is

without merit.

As correctly cited by appellant, the general rule regarding full siblings is that young children should not be separated from each other in the absence of exceptional circumstances. *See Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). However, awarding child custody based *solely* on the presumption that siblings should be kept together is contrary to the custody statute providing that, in a divorce action, an award of custody shall be made solely in accordance with the welfare and best interests of children; although the value of keeping siblings together is a factor in determining what is in a child's best interest, that rule cannot rise to level of a presumption that contradicts the statutory best-interest standard. *See Atkinson v. Atkinson*, 72 Ark. App. 15, 32 S.W.3d 41 (2000). Moreover, the prohibition against separating siblings in the absence of exceptional circumstances does not apply with equal force in cases where the children are half-siblings. *See Eaton v. Dixon*, *supra*; *Riddle v. Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989).

The split of custody in this case was justified by the circuit court's finding that appellant would not foster the children's relationship with appellee, the fact that appellee had a more stable lifestyle, and the fact that his extended family participated in all of the children's care. *See Eaton*, *supra*. Moreover, the circuit court plainly considered the effect of divided custody on the children, in ordering that appellee's visitation with Daniel coincide with those periods during which appellee has custody of Keyton and Kayla. On these facts, we hold that the award of divided custody was not clearly erroneous.

IV. Visitation

Appellant further argues that circuit court erred in awarding visitation without finding that appellee stood *in loco parentis* to Daniel and in finding that visitation with appellee is in

Daniel's best interests. Neither argument is convincing.[3]

The main consideration in making a judicial determination concerning visitation is the best interest of the child. *See Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). Important factors to be considered in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. *Id.* The setting of visitation rights is a matter that lies within the sound discretion of the circuit court. *Id.* We give due deference to the superior position of the circuit judge to view and judge the credibility of the witnesses. *See Hamilton, supra.*

Charles Smith, appellee's nephew, characterized appellee's relationship with Daniel as "great, with a lot of communication" and said that Daniel "seems as though he is happy to be there and as though he enjoys being around [appellee] very much." Robin Pace, who has dated appellee's sister since approximately September 2005, characterized the relationship between Daniel and appellee as "a father-son relationship." He said that he did not know at first that Daniel was not appellee's biological son and that if one did not know it, one would think that Daniel was appellee's biological son. Pace said that, since the separation, the children appear to be more clingy and insecure and "want Daddy all the time."

A circuit court cannot award visitation to a stepparent unless it first finds that a stepparent stands *in loco parentis* to the child. *See Robinson, supra.* The phrase, *"in loco parentis"* is defined as, "Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all of some of the responsibilities of a parent." BLACK'S LAW DICTIONARY, 803 (8th ed. 2004).

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[3]Appellant again cites to *Troxel supra*, and asserts that the circuit court's award of visitation violates her fundamental right to raise her child as she sees fit and punishes her for exercising that right. As previously stated, her argument is not preserved.

While the circuit court did not use the express phrase "*in loco parentis*" in its written order, it stated:

> The Court finds that Daniel Davis has *no relationship with his biological father*, and that since the parties' marriage in 2003, the Plaintiff, *Thomas Chandler, has been the only father figure in his life*, and as a result, the Court finds it is in the minor child's best interest that Plaintiff have visitation on a regular basis with Daniel Davis.

(Emphasis added.) In finding both that Daniel had no relationship with his biological father and that appellee was the only father that Daniel had ever known, the court implicitly found that appellee has been standing in the place of Daniel's biological father. Given these findings, we cannot say that the circuit court failed to cite to any evidence to support a finding that appellee acted *in loco parentis* to Daniel.[4]

Appellant's final argument is that it is not in Daniel's best interest to be required to have contact with a man, not his biological father, who is an alcoholic and who physically abused him. However, we defer to the circuit court's credibility determination that appellee had stopped drinking in front of the children and that his drinking was not causing any problems. Moreover, the incident during which appellee hit Daniel in the mouth is inexcusable but appears to be an isolated incident. In short, the evidence proving that appellee stood *in loco parentis* to Daniel also proved that it is in Daniel's best interest to have visitation with him. *See, e.g.*, *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997)(affirming a visitation award to the stepfather standing *in loco parentis* over the objection of the natural mother). Additionally, appellant is hard-pressed to challenge the circuit court's award of visitation where, despite appellee's conduct, she consented to have appellee adopt Daniel. Accordingly, we affirm the circuit court's visitation award.

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[4]As this was not a termination situation, the circuit court could award visitation even though the biological father had not legally relinquished his rights. It is sufficient for visitation purposes that the biological father has shown indifference to the welfare of his child in voluntarily relinquishing his parental obligations by failing to maintain contact with his child. *See Golden*, *supra*.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.