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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-21-408

		Opinion Delivered March 8, 2023
SHANE A. WALLIS	APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. 43DR-15-749]
V.		HONORABLE JASON ASHLEY PARKER, JUDGE
SAMANTHA K. HOLSING	APPELLEE	AFFIRMED

WENDY SCHOLTENS WOOD, Judge

Shane Wallis appeals the Lonoke County Circuit Court's order modifying custody and awarding the parties joint custody of their minor child. Wallis contends that the circuit court's decision to modify custody was clearly erroneous. He challenges both the court's finding of a material change in circumstances and its determination that a modification of custody is in the child's best interest. We affirm.

Wallis and Samantha Holsing were divorced on September 28, 2016. The decree awarded primary custody of the parties' minor child to Wallis and supervised visitation to Holsing, with Holsing's visitation to transition to unsupervised within ninety days of the decree.

The matter on appeal began on April 2, 2020, when Holsing filed a motion to modify the decree in which she requested joint custody. She alleged multiple instances of Wallis's conduct that she contended supported her motion.

The court held a two-day hearing, during which eight witnesses testified—including the parties. The ad litem opined that the parties should have joint custody, expressing concern that they would be "back in court in six months" if either were awarded primary custody. She said that the child—who was five years old at the time of the hearing—is well-rounded, excels in school, and appears outwardly to be unaffected by the parties' discord. The ad litem said, however, that her investigation led her to conclude that Wallis is "a bit controlling," is extremely overprotective, can be abrasive, and has to have things his way. She believed that the child's anxiety level is "extremely high" and that the child is "scared about what to say to people" for fear of getting in trouble. Regarding her opinion of what caused this anxiety, she pointed to Wallis's videoing custody exchanges and his unnecessary involvement of the police following Holsing's ill-advised "poop prank" on the child.[1] The ad litem said it was clear that the child was fully aware the prank was a joke before she was questioned weeks later by Wallis, yet Wallis called the police to investigate the matter. Following the ad litem's surprise visit to Holsing's home and interviews with Holsing's neighbors, the ad litem reported that she found no evidence to support Wallis's allegations that Holsing had inadequate food in her home or that her home life was inappropriate. The ad litem expressed concern with Wallis's constant focus on the child's weight, indicating that he weighs the child before and after each visit with Holsing.

At the close of the hearing, the circuit court orally found that there had been a material change in circumstances regarding the parties' interactions and communication since the divorce decree. While the court recognized that the parties had experienced communication

[1]After seeing a post on social media, Holsing told the child that melted chocolate was "poop."

issues since the divorce, it specifically noted that Holsing had "matured" and was doing better and that Wallis was causing a communication breakdown and was not listening to reasonable requests from Holsing. The court cited Wallis's failure to tell Holsing that the child had been in counseling for the past year for night terrors, his refusal to work with Holsing regarding extracurricular activities, and his actions during the COVID-19 pandemic when he forbade Holsing from seeing or speaking with the child for twenty-eight days in spite of the fact that he, his wife, and his mother (who lived with him) continued to work outside the home and risk exposure. The court also expressed concern with Wallis's decision to involve police in the "poop prank"; his decision to record the child's conversations with Holsing during exchanges; and his behavior during coparenting sessions that resulted in the therapist discontinuing them.

The court entered an order on April 1, 2021, granting Holsing's request for a modification. The court found there had been a material change in circumstances warranting a change in custody:

> a. The parties' minor child is in counseling. [Holsing] was not informed or even made aware of the counseling. [Holsing] was also not made aware of the child's night terrors.
>
> b. [Wallis] withheld the child's insurance card from [Holsing].
>
> c. [Wallis] would not modify visitation to accommodate [Holsing's] work schedule.
>
> d. [Wallis] often refused to work with [Holsing] on issues regarding the child.
>
> e. [Wallis] contacting Police regarding the chocolate/poop prank.
>
> f. [Wallis] and his wife videoing the conversations between the minor child and [Holsing]. During the video, the minor child keeps looking to [Wallis] for approval before speaking.

g. [Wallis] would not work with [Holsing] while she is giving a reasonable request for her family to pick up the minor child while [Holsing] was giving birth.

The circuit court further determined that the case was similar to *Szwedo v. Cyrus*, 2020 Ark. App. 319, 602 S.W.3d 759, finding that Wallis had "gone overboard" in not attempting to coparent with Holsing. The court awarded the parties "true joint legal and physical custody" of their child, ordering them to utilize shared parenting on major issues and to follow any professional recommendations when their "legitimate good faith efforts" failed to end in agreement. The court provided very specific rules governing the parties' shared parenting, including ordering the parties to communicate about the child through weekly emails, forbidding the parties from engaging in any conduct to alienate the child from the other party, and keeping the other party informed of the child's health, education, and activities. This appeal followed.

This court performs a de novo review of child-custody matters, but we will not reverse a circuit court's findings unless they are clearly erroneous. *Pace v. Pace*, 2020 Ark. 108, at 9, 595 S.W.3d 347, 352. 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. *Smith v. Parker*, 67 Ark. App. 221, 224, 998 S.W.2d 1, 3 (1999). We recognize and give special deference to the superior position of a circuit court to evaluate the witnesses, their testimony, and the child's best interest. *Cunningham v. Cunningham*, 2019 Ark. App. 416, at 4, 588 S.W.3d 38, 40.

Modification of custody is a two-step process: first, the circuit court must determine whether a material change in circumstances has occurred since the last custody order; and second, if the court finds that there has been a material change in circumstances, the court must

determine whether a change of custody is in the child's best interest. *Shell v. Twitty*, 2020 Ark. App. 459, at 4, 608 S.W.3d 926, 929–30. The best interest of the children is the polestar in every child-custody case; all other considerations are secondary. *Skinner v. Shaw*, 2020 Ark. App. 407, at 11–12, 609 S.W.3d 454, 461. Moreover, the crux of these cases is that a child-custody determination is fact specific, and each case ultimately must rest on its own facts. *Self v. Dittmer*, 2021 Ark. App. 85, at 9, 619 S.W.3d 43, 48.

We look at whether there has been a material change in circumstances since issuance of the last order of custody—here the divorce decree. *Szwedo,* 2020 Ark. App. 319, at 9, 602 S.W.3d at 766. Failure of communication, increasing parental alienation by a custodial parent, and inability to cooperate can all constitute a material change in circumstances sufficient to warrant modification of custody. *See Self*, *supra*; *Szwedo*, *supra*; *Montez v. Montez*, 2017 Ark. App. 220, 518 S.W.3d 751. Further, we have held that the combined, cumulative effect of particular facts may together constitute a material change. *Shannon v. McJunkins*, 2010 Ark. App. 440, at 10, 376 S.W.3d 489, 494; *see also* *McCoy v. Kincade*, 2015 Ark. 389, at 5, 473 S.W.3d 8, 11.

On appeal, Wallis argues that the parties' inability to get along, coparent, and communicate civilly with one another are facts that have been known to the circuit court since the divorce decree was entered; therefore, they do not constitute a material change in circumstances. We are guided by this court's holding in *Szwedo*, *supra*, in which we affirmed the circuit court's modification of custody from primary custody in the mother to joint custody. The circuit court determined that a material change in circumstances had occurred as a result of the increased frequency of the mother's alienating behaviors and the negative impact it was having

on the children. *Id.* at 14, 602 S.W.3d at 768. The mother argued on appeal that, because the alienating behaviors she exhibited were known before entry of the last order of custody, her behavior could not constitute a material change of circumstances. *Id.* at 14, 602 S.W.3d at 768. We disagreed, holding that a parent's continuing pattern of alienation may constitute a material change in circumstances warranting a change in custody. *Id.* at 15, 602 S.W.3d at 769. We cited *Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007), and *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997), as examples of situations in which we affirmed a circuit court's finding of a material change when the behavior involved a pattern of parental alienation by one party. *Id.*, 602 S.W.3d at 769.

Here, as in *Szwedo*, the circuit court found the failure in communication and increased parental discord between the parties to be escalating but essentially unilateral, and it refused to reward Wallis for creating the situation. We hold that it was not clearly erroneous to consider this a material change in circumstances.

Wallis also argues that the evidence of isolated incidents in this case simply does not rise to the level of a material change in circumstances justifying a modification of custody. However, the incidents were considered by the court in combination with other circumstances. And it was not merely that the parties could not get along or communicate effectively that the court considered a material change. As set forth herein, the circuit court expressly identified many examples of Wallis's noncooperative conduct. The court also specifically found that Wallis's noncooperative behavior had worsened and that he is primarily responsible for the communication breakdown between the parties. The court said that he had "gone overboard"

in his failure to coparent with Holsing, while she had matured. We will not substitute our judgment for that of the circuit court, which observed the witnesses first hand. *Self*, 2022 Ark. App. 48, at 15, 641 S.W.3d at 13. Having reviewed the court's findings, the record as a whole, and the applicable case law, we conclude that the court's finding of a material change in circumstances is not clearly erroneous.

Wallis also challenges the court's determination that joint custody is in the child's best interest. Citing *Li v. Ding*, 2017 Ark. App. 244, 519 S.W.3d 738, and *Hewitt v. Hewitt*, 2018 Ark. App. 235, 547 S.W.3d 138, he argues that it is reversible error to grant joint custody when cooperation between the parties is lacking. He also contends that because there was no evidence that the parties' inability to communicate had negatively impacted their child, it is not in her best interest to modify the custody arrangement.

We recognize the following commonly cited principle relied on by Wallis: "the mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of an award of joint custody, and such an award is reversible error when cooperation between the parties is lacking." *Li*, 2017 Ark. App. 244, at 11, 519 S.W.3d at 744; *Hewett*, 2018 Ark. App. 235, at 6, 547 S.W.3d at 141. However, this principle may not apply when the parent with primary or sole custody is increasing the discord between the parties. *Szwedo*, 2020 Ark. App. 319, at 16–17, 602 S.W.3d at 769–70. Moreover, the circuit court must still make a decision whether joint custody is in the best interest of the child even when it finds that a material change in circumstances is based on parental discord and failure of cooperation. *Self*, 2021 Ark. App. 85, at 8, 619 S.W.3d at 47 (citing *Montez*

v. Montez, 2019 Ark. App. 61, 572 S.W.3d 401 (affirming award of sole legal custody but 50/50 shared "parenting time" where the parents were unable to cooperate and communicate on shared decisions affecting the children); and *Hoover v. Hoover*, 2016 Ark. App. 322, at 4, 498 S.W.3d 297, 299, 301 (affirming award of joint custody where, although a "significant level of animosity" and "considerable" difficulty in communication and cooperation existed between the parties, record demonstrated both parties were capable parents who love their children and were equally involved)).

We are also mindful that the law of custody in Arkansas has changed in the last decade. In 2013, the General Assembly dictated that joint custody is "favored," which our supreme court recognized was a "profound" change in the law. Act 1156 of 2013; *Pace*, 2020 Ark. 108, at 9, 595 S.W.3d at 352. In 2021, the General Assembly again significantly changed the law regarding custody, creating a rebuttable presumption that joint custody is in a child's best interest. Act 604 of 2021; Ark. Code Ann. § 9-13-101(a)(1)(A)(iv)*(a)* (Supp. 2021). Furthermore, in the event a court determines that the presumption has been rebutted and does not award joint custody, the legislature provided that the noncustodial parent is entitled to "reasonable parenting time." Ark. Code Ann. § 9-13-101(b)(1)(A)(vii).

These legislative changes recognized a preference for divorced parents to share equal time with their children unless clear and convincing evidence demonstrates it is not in the best interest of the child. Ark. Code Ann. § 9-13-101(b)(1). Although we recognize that these laws apply specifically to initial custody determinations, they have been applied in other custody determinations. The supreme court recently affirmed a circuit court's denial of a motion for modification and continuance of a joint-custody arrangement when the parties clearly could not

get along but there was no evidence the "parental discord" had affected the child's health and welfare. *Pace*, 2020 Ark. 108, at 10, 595 S.W.3d at 353. The court specifically recognized the legislature's change favoring joint custody, noting that "the parties were no longer obligated to maintain a careful balance of cooperation to stave off a judicial dissolution of a joint-custody arrangement." *Id.* at 10, 595 S.W.3d at 352; *see also Nalley v. Adams*, 2021 Ark. 191, 632 S.W.3d 297 (holding there was no "modification" but affirming a circuit court's change of custody from primarily with the mother to equal time with each parent as an authorized adjustment of parenting time).

Finally, contrary to Wallis's argument, there is evidence that the parties' inability to communicate is negatively impacting their child. Although the child appeared to be doing well and excelled in school, there was also evidence that the child's anxiety level is "extremely high" and that the child is scared about what to say to people for fear of getting in trouble due mainly to Wallis's behavior. There was also evidence that the child is being weighed before and after visits with Holsing. For these reasons, we hold that the circuit court did not clearly err in finding that the modification of the decree to joint custody is in the best interest of the parties' child. Accordingly, we affirm.

Affirmed.

THYER and BROWN, JJ., agree.

Hilburn & Harper, Ltd., by: *SaraCate Moery*, for appellant.

Samantha Holsing, pro se appellee.