Cite as 2023 Ark. App. 485

# ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-22-596

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| LIZ ALSINA<br>APPELLANT<br><br>V.<br><br>JOSHUA HICKS<br>APPELLEE | Opinion Delivered November 1, 2023<br><br>APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04DR-20-274]<br><br>HONORABLE XOLLIE DUNCAN, JUDGE<br><br>AFFIRMED |

**RAYMOND R. ABRAMSON, Judge**

Liz Alsina appeals the Benton County Circuit Court's order granting Joshua Hicks's motion to modify custody of their daughter. On appeal, Alsina argues that the circuit court erred in modifying custody. We disagree and affirm.

Liz Alsina (Alsina) and Joshua Hicks (Hicks) were never married but have a child, born in October 2019. By order entered June 15, 2020, the court found Hicks to be the child's biological father. The paternity order awarded primary custody to Alsina with modified standard visitation to Hicks. Hicks was also ordered to pay child support. The paternity order specified that "[t]he parties shall make every effort to communicate with each other regarding the minor child in a calm and reasonable manner."

On October 26, 2021, Alsina filed a petition for modification of visitation and finding of contempt as well as a motion for ex parte order for immediate hearing. On

October 28, the court granted the ex parte order and set a hearing for November 4. The court entered an agreed temporary order setting out a visitation schedule.

On January 3, 2022, Hicks moved for contempt and for change of custody. Hicks filed an amended motion for change of custody on June 6, stating that Alsina's mother had been charged with a criminal offense and arraigned. She confessed that she had placed a recording device in the child's diaper bag on July 12, 2021.

The court held a hearing on the pending motions on June 28, 2022, and entered an order on July 13, stating:

> The Court finds that there has been a material change in circumstances due to [Alsina's] actions. [Alsina] has tried to cut [Hicks] out of the minor child's life, including refusing to keep [Hicks] apprised of medical appointments on numerous occasions and having the child baptized and purposely refusing to notify [Hicks] about it until long after the fact (the Court finds this act to be contemptuous). [Alsina] now requests to move to the Seattle, Washington area with the minor child, which will only serve to make the father a non-entity in the child's life. Such a move, combined with the Court's belief that the mother's behavior is only going to continue, would destroy the relationship between [Hicks] and the minor child.

The court went on to deny Alsina's request to relocate and modify visitation and to grant Hicks's motion to modify custody, stating that Alsina "indicated she had obtained employment in the Seattle area – if she decides to move to the Seattle area then the minor child will remain in Arkansas and [Hicks] will have custody. Otherwise, the custody of the minor child is modified to a true joint custody 50/50 week on/week off arrangement." The order also terminated Hicks's prior child-support obligation. Aside from the mention of "contemptuous" behavior in the excerpt above, the circuit court's order did not address the

contempt motions from either party, aside from a general statement that "[a]ny other motions not specifically addressed herein are hereby denied."[1]

Alsina filed a notice of appeal on August 6, 2022. The sole issue on appeal is whether the circuit court erred in modifying the custody order.[2]

This court reviews domestic-relations cases de novo, but we will not reverse the circuit court's factual findings unless they are clearly erroneous or against the preponderance of the evidence. *Smith v. Smith*, 2023 Ark. App. 108, 661 S.W.3d 273. A finding 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 made. *Id.* Deference is given to the circuit court's superior position to determine the credibility of witnesses, the weight to be given their testimony, and the child's best interests. *Id.*; *see also Cunningham v.*

[1]The question of whether an order is a final, appealable order pursuant to Ark. R. App. P.–Civ. 2(d) is a jurisdictional question that this court will raise sua sponte. *Edwards v. Ark. Dep't of Hum. Servs.*, 2015 Ark. 402, at 4, 474 S.W.3d 58, 60. This court has held that dismissal without prejudice is warranted due to lack of a final, appealable order when the circuit court failed to address or resolve multiple pending contempt motions. *Hamerlinck v. Hamerlinck*, 2022 Ark. App. 89, 641 S.W.3d 659. Here, however, we find that the court's blanket denial of all other pending motions (including contempt motions from both parties) in its July 13, 2022 order was sufficient to resolve them.

[2]There is much discussion within both Alsina's opening brief and the reply brief regarding relocation and the presumption set forth in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003) regarding relocation of a primary custodial parent (the court denied, in the same order, Alsina's request to relocate). Because appellant is clear that she is not challenging the relocation determination, however, we view this argument in light of its application to the modification of custody. *See* Appellant's Opening Brief at 18 (Alsina identifies "a single primary point – the circuit court's order changing custody was clearly erroneous.").

*Cunningham*, 2019 Ark. App. 416, 588 S.W.3d 38. The circuit court's best-interest findings, however, must be supported by evidence rather than "stereotypical predictions of future harm." *Moix v. Moix*, 2013 Ark. 478, at 11, 430 S.W.3d 680, 686.

The primary consideration in child-custody cases is the welfare and best interest of the child, with all other considerations being secondary. *Doss v. Doss*, 2018 Ark. App. 487, 561 S.W.3d 348. Courts apply a more stringent standard to modifications of custody than to initial determinations due to the public-policy interest of promoting "stability and continuity in the life of the child, and to discourage the repeated litigation of the same issues." *Alphin v. Alphin*, 364 Ark. 332, 340, 219 S.W.3d 160, 165 (2005).

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; 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 burden of proving such a change in circumstances is on the party seeking modification. *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). Custody should not be changed unless conditions have altered since the decree was rendered or material facts existed at the time of the decree but were unknown to the court, and then only for the welfare of the child. *White v. Taylor*, 19 Ark. App. 104, 717 S.W.2d 497 (1986).

Alsina first cites authority for the proposition that the oral comments made from the bench should be disregarded or are not material to the issue on appeal. We disagree.

In support of this proposition, Alsina cites *Anderson v. Arkansas Department of Human Services*, 2020 Ark. App. 401, at 10, 608 S.W.3d 915, 921, which addresses conflicts between a written order and bench ruling. *Id.* ("To the extent that the circuit court's bench ruling conflicts with its written order, if at all, the written order controls over the court's oral ruling."). We have repeatedly stated that a "written order controls." *See, e.g.*, *McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 67, 243 S.W.3d 278, 284 (2006). Aside from containing limited factual findings, which the court noted were examples of alienating behaviors, however, Alsina does not point to any ways in which the bench ruling actually conflicts with its written order. We find no merit in this argument.

Alsina next challenges the circuit court's limited factual findings in support of its order modifying custody, stating that the "two items and a prediction . . . standing alone or considered together, do not justify the drastic remedy of divesting Liz of primary custody." Specifically, Alsina points to the circuit court's language regarding "a material change in circumstances due to the Defendant's actions." The court went on to state:

> [Alsina] has tried to cut [Hicks] out of the minor child's life, including refusing to keep [Hicks] apprised of medical appointments on numerous occasions and having the child baptized and purposely refusing to notify [Hicks] about it until long after the fact (the Court finds this act to be contemptuous). [Alsina] now requests to move to the Seattle, Washington area with the minor child, which will only serve to make the father a non-entity in the child's life. Such a move, combined with the Court's belief that the mother's behavior is only going to continue, would destroy the relationship between [Hicks] and the minor child.

This court has found a "material change in circumstances" to exist on the basis of uncooperative behavior, communication failures, increasing alienation by a custodial parent,

and inability to coparent. *See, e.g.*, *Wallis v. Holsing*, 2023 Ark. App. 137, at 5, 661 S.W.3d 284, 288. Although, in this instance, Alsina essentially contends that the findings of the circuit court constituted material change or that the communication and failure-to-cooperate issues arose as a result of her conduct, reaching a different conclusion in this case would encroach upon the superior position of the circuit court with regard to evaluating witness testimony and credibility.

With regard to the court's consideration of Alsina's potential relocation to justify a material change in circumstances, Alsina argues that doing so contradicts Arkansas law on relocation as announced in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). Again, though the appellant discusses *Hollandsworth* and the relocation factors extensively, the appellant presumably does so only in the context of the custody-modification determination she is challenging. Where appellant does not request a reversal of the relocation decision on appeal, we decline to address that argument. *See, e.g.*, *Wilson v. Wilson*, 2016 Ark. App. 191, at 10, 487 S.W.3d 420, 426–27 ("[T]he appellate court will not conduct research on appellant's behalf."). Appellant argues that "*Hollandsworth* holds that relocation is not a material change of circumstances to justify a change of custody." The holding of *Hollandsworth* is more accurately stated, however, that "relocation of a primary custodian and his or her children *alone* is not a material change in circumstance." 353 Ark. at 476, 109 S.W.3d at 657 (emphasis added).

In *Shannon v. McJunkins*, 2010 Ark. App. 440, 376 S.W.3d 489, this court affirmed a custody modification over a parent's objections that the circuit court erred in applying

*Hollandsworth* therefore rendering the custody determination flawed and invalid. Instead, we found that no error required reversal. *Id.* Relevant to the court's analysis in that case were two important considerations that are also present here: cumulative circumstances and the superior position of the circuit court to observe the parties. *Id.* at 8–10, 376 S.W.3d at 493–94. The court stated that "relocation was not the sole factor upon which a change of circumstances was alleged. The trial court's analysis focused more upon the disruptive influences and events in appellant's household compared with the stability and nurturing environment in appellee's home." *Id.* at 8, 376 S.W.3d at 493. The court then went on to note that "[t]here are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carries a greater weight than those involving the custody of minor children, and our deference to the trial judge in matters of credibility is correspondingly greater in such cases." *Id.* at 10, 376 S.W.3d at 494. The same is true here.

Moreover, even when the circuit court fails to make findings of fact regarding a change in circumstances, under our de novo review, we may still conclude that there was "sufficient evidence from which the circuit court could have found a change in circumstances." *Geren Williams v. Geren*, 2015 Ark. App. 197, at 10, 458 S.W.3d 759, 766. In this instance, the circuit court made factual findings in support of a determination that Alsina's actions constituted a material change. Even setting aside the potential relocation and relying solely on the other factors that the circuit court found were attempts "to cut [Hicks] out of the minor child's life," we would still conclude that there was sufficient

evidence from which the circuit court could have found—and did, in fact, find—such a change.

Though Alsina cites *Geren Williams* for the proposition that Hicks could not "create a material change based on his own aggressive behavior and demeanor," the court made specific factual findings regarding Alsina's behavior in its written order (consistent with additional statements from the bench) in support of the "material change" prong. We hold that the circuit court's conclusion regarding a material change in circumstances was not clearly erroneous.

Turning next to the second prong for purposes of a custody modification, Alsina argues that the circuit court's order failed to address the "polestar" of child-custody cases: "the best interest" of the child. To Alsina's point, this is to be the primary consideration in child-custody cases and seems notably absent from the court's written order, which never explicitly mentions the child's "best interest." The court does, however, discuss Hicks's "respectable, consistent, parental role in his daughter's life."

In fact, there are a number of cases in which we have found that a pattern of alienating behaviors by one parent is detrimental to a child's best interest. *See, e.g.*, *Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007); *Hanna v. Hanna*, 2010 Ark. App. 58, at 16, 377 S.W.3d 275, 284 ("Whether one parent is alienating a child form the other is an important factor to be considered in change of custody cases, for . . . a caring relationship with both parents is essential to a healthy upbringing." (quoting *Turner v. Benson*, 59 Ark. App. 108, 113, 953 S.W.2d 596, 598 (1997))).

In this case, the hearing consisted of testimony from five witnesses: three of whom were in Alsina's family (Alsina, her mother, and her father), a play therapist, and Hicks. Hicks testified extensively regarding Alsina's failure to communicate or coordinate with him in instances that he said such efforts would be for the benefit of their daughter, such as doctor's appointments or allowing him to be present at her baptism. Even though the number of witnesses was in favor of the Alsina family, the court nevertheless chose to largely discredit their testimony. We decline to disrupt this credibility determination. The circuit court is presumed to be a better judge of credibility and factual findings than this court on appeal. *Holland v. State*, 2015 Ark. 318, at 6, 468 S.W.3d 782, 786.

Alsina cites several cases for the propositions that a parent's conduct around medical appointments and religious beliefs is relevant only to the extent that it "affect[s] children's best interests." *See, e.g.*, *Hicks v. Cook*, 103 Ark. App. 207, 212, 288 S.W.3d 244, 248 (2008). Alsina argues that the court should have imposed contempt sanctions rather than the more drastic remedy of modifying child custody to address unfavorable conduct of the parties. *See, e.g.*, *Carter v. Carter*, 19 Ark. App. 242, 249, 719 S.W.2d 704, 707 (1986). However, the only inquiry for this court is whether the circuit court clearly erred in modifying the custody arrangement to a joint arrangement. Here, we cannot say that the circuit court's modification of custody based on its finding that Alsina's actions were alienating the child from her father in derogation of her best interest was clearly erroneous. We therefore affirm.

Affirmed.

KLAPPENBACH and THYER, JJ., agree.

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