CITE AS 2009 ARK. APP. 484 (UNPUBLISHED)
ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION III

CA08-1321

June 17, 2009

	APPEAL FROM THE UNION COUNTY CIRCUIT COURT
JEFFREY A. WILLIAMS	[DR-04-202-6-1]
APPELLANT	
V.	HONORABLE DAVID F. GUTHRIE, JUDGE
LISA WILLIAMS	
APPELLEE	AFFIRMED

Appellant, Jeffrey Williams, appeals from the circuit court's denial of his petition for change of custody and the increase of his monthly child-support payments from the ordered $420 a month to $625 a month. He contends 1) that the trial court abused its discretion in modifying the existing child-support order because no proper motion had been filed by appellee, Lisa Williams, and 2) that the trial court clearly erred in finding that there had been no material change of circumstances. We affirm.

Background

Lisa and Jeffrey were divorced by decree entered on May 5, 2005. They were awarded joint custody of their minor child, W.W., with Lisa having primary physical

custody of the child, and Jeffrey paying $420 in monthly child support. Later, Jeffrey began voluntarily increasing his child-support payments as he received raises.

On February 20, 2008, Jeffrey filed a petition for change of custody, alleging that there had been a material change of circumstances. In the prayer of his petition, Jeffrey also sought "a reasonable sum of child support to be paid by [Lisa]." At the time he filed the petition, he was paying $625 a month in child support. Lisa answered the petition with a denial, and in her prayer, she sought in pertinent part: "current sum of child support [being paid] by [Jeffrey]." Following the hearing, the trial court denied the request for change of custody and ordered Jeffrey to pay the amount of child support that he had been paying voluntarily — $625 a month, which was an increase from the previously ordered amount of $420 a month.

Child Support

For his first point of appeal, Jeffrey contends that the trial court erred in ordering the increase in child-support payments because Lisa had not filed a proper motion seeking that modification. We disagree. In making his argument, Jeffrey relies upon Arkansas Code Annotated section 9-14-234(b) and (c) (Repl. 2008) and *Martin v. Martin*, 79 Ark. App. 309, 87 S.W.3d 817 (2002). Subsection 9-14-234(b) and (c) provide:

> 9-14-234. Arrearages - Finality of judgment.
>
> (b) Any decree, judgment, or order that contains a provision for the payment of money for the support and care of any child or children through the registry of the court or the Arkansas child support clearinghouse shall be final judgment subject to writ of garnishment or execution as to any installment or payment of money that has accrued *until the time either party moves through proper motion filed with the*

> *court and served on the other party to set aside, alter, or modify the decree, judgment, or order.*
>
> (c)(1) The court may not set aside, alter, or modify any decree, judgment, or order that has accrued unpaid support prior to the filing of the motion.
>
> (2) However, the court may offset against future support to be paid those amounts accruing during time periods other than reasonable visitation in which the noncustodial parent had physical custody of the child with the knowledge and consent of the custodial parent.

(Emphasis added.) Jeffrey cites *Martin* for the proposition that an existing child-support order remains intact until such time as a proper motion is filed. Neither of the above-cited authorities provide support for Jeffrey's position in this case.

In *Martin*, the pending petition was for contempt for failure to pay support, and the parties acknowledged at the outset of the hearing that no petition had been filed seeking modification of the decree. In addition, section 9-14-234 clearly applies to arrearages in child-support payments. Here, there was no unpaid child support that would justify a contempt proceeding or invoke the provisions of section 9-14-234.

The petition filed by Jeffrey sought modification of child custody and also contained a prayer for child support should custody be awarded to him. In her answer, Lisa prayed for physical custody of the child to remain with her and for the child-support amount to remain at the current sum (*i.e.*, the sum being voluntarily paid by Jeffrey, which was an increase from the original ordered amount). The issue of the appropriate amount of child support was thereby "properly" before the court, even though Lisa did not file a separate motion seeking an increase.

Material Change of Circumstances

Jeffrey relied upon three allegations of changed circumstances in seeking a change of custody: 1) that Lisa failed to provide and maintain a suitable and safe environment for W.W., in particular by moving several times within the three years since the divorce; 2) that during an incident on February 5, 2008, Lisa and a co-worker engaged in behavior that risked harm to W.W., in that they were both passed out while W.W. was in Lisa's care; and 3) that W.W. had numerous absences and tardies from school. In addition, at the hearing, he added a fourth allegation concerning W.W.'s deteriorating dental health.

Following the hearing, the trial court concluded that Jeffrey had not demonstrated a material change of circumstances justifying a change of custody. Specifically, the trial court found that the February 5, 2008 incident was an isolated occurrence that did not endanger the child's health or safety; that the dental problems were being addressed in a proper manner; that while the absences/tardies were too high, the child had still performed at a satisfactory level; and that Lisa had stabilized her employment situation, thereby improving her financial situation and her schedule, allowing her to better provide for her child.

In *Stehle v. Zimmerebner*, 375 Ark. 446, ____, ____ S.W.3d ____, ____ (2009), our supreme court explained at great length our appellate review of equity cases:

> We have summarized our standard of review for equity cases, and specifically child custody cases, with regard to de novo review and the clearly erroneous standard:

> We review chancery cases de novo, but will only reverse if the chancellor's findings were clearly erroneous or clearly against the preponderance of the evidence. A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. We give due deference to the chancellor's superior position to determine the credibility of the witnesses and the weight to be given their testimony. In cases involving child custody, great deference is given to the findings of the chancellor. This court has held that there is no other case in which the superior position, ability, and opportunity of the chancellor to observe the parties carries a greater weight than one involving the custody of minor children. The best interest of the child is the polestar in every child custody case; all other considerations are secondary.

See Ford v. Ford, 347 Ark. 485, 491, 65 S.W.3d 432, 436 (2002) (citations omitted).

We take this opportunity to clarify further our standard of review for child custody cases, as well as other equity cases, and to dispel any confusion that may exist concerning de novo review and our clearly erroneous standard.

Equity cases are reviewed de novo. *See ConAgra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (2000). This means the whole case is open for review. *Id*. This does not mean, however, and we emphasize this point, that findings of fact by the circuit judge in equity cases are simply dismissed. They are not. The clearly erroneous standard, cited above and set out in our rules of civil procedure, governs if the circuit judge has made findings of fact. As Rule 52(a) states:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of witnesses.

Ark. R. Civ. P. 52(a) (2008).

In determining whether the circuit judge clearly erred in a finding, the appellate court may look to the whole record to reach that decision. *See ConAgra*, 342 Ark. at 674, 30 S.W.3d at 727 (on de novo review of record, court held chancery court clearly erred in finding information at issue qualified as a trade secret); *Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979) (chancery court reached erroneous conclusion based on de novo review of entire record). But, to reiterate, to reverse a

> finding of fact by a circuit judge, that judge must have clearly erred in making that finding of fact, which means the reviewing court, based on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Ford*, 347 Ark. at 491, 655 S.W.3d at 436.
>
> To summarize, de novo review does not mean that the findings of fact of the circuit judge are dismissed out of hand and that the appellate court becomes the surrogate trial judge. What it does mean is that a complete review of the evidence and record may take place as part of the appellate review to determine whether the trial court clearly erred in either making a finding of fact or in failing to do so.

Following our review of the record in this case, we are not left with a definite and firm conviction that the trial court made a mistake regarding any of its factual findings.

Affirmed.

GLADWIN and GRUBER, JJ., agree.