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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 10-42

PAMELA BRAND APPELLANT V. GREGORY MOUROT APPELLEE	**Opinion Delivered** October 20, 2010 APPEAL FROM THE PERRY COUNTY CIRCUIT COURT [NO. DR-2002-96] HONORABLE ELLEN B. BRANTLEY, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

This is a contentious battle over custody of now eight-year-old C.M., the parties' son. The circuit court ordered custody to be changed from C.M.'s mother, Pamela Brand, to his father, Gregory Mourot. Pamela challenges this ruling, arguing that Greg failed to prove a material change in circumstances sufficient to justify a change in custody. We hold that the circuit court did not err in awarding Greg custody in light of evidence showing that C.M. missed an excessive number of school days and that Pamela failed to comply with the visitation order on several occasions. Thus, we affirm.

Background

C.M. was born in July 2002. In December 2003, Greg established paternity and was awarded visitation. And the long history of litigation began. Greg filed his first motion for contempt in October 2004. The court later held a brief hearing, where Pamela admitted that

Greg had not been able to visit on a regular basis. Greg asked the court not to punish her at that time, and the court entered an agreed order in January 2005 reflecting a modification to the visitation schedule. Two months later, Greg asked the court to hold Pamela in contempt again, citing lack of visitation. Pamela responded by filing a counter-petition for contempt, alleging Greg's failure to pick up and return C.M. timely and failure to pay child support. The court ordered Greg to pay child support, but the other matters were continued.

Greg filed another motion for contempt in July 2006. This time, the court found Pamela in contempt and ordered her to pay Greg's attorney's fee. He filed yet another one in May 2007. The court found Pamela in contempt again and ordered her to serve a brief amount of time in county jail. Greg filed another motion in October 2007, but that one was dismissed for lack of service. Greg filed his most recent motion for contempt in July 2008. He followed that up with a motion to change custody in September 2008 (the subject of this appeal), and the court held a hearing on the motion to change custody in December 2009.

First to testify was Gwen Jones, who keeps records at C.M.'s elementary school. Her records showed that C.M. missed sixty-six days of school the previous year. He was dropped from school for missing ten consecutive days in a row. The records show that the absences were excused and that the school has doctor's notes on file, but Jones testified that the school's policy was to consider an absence excused as long as a parent or guardian called to let the school know of the absence. Also entered into evidence was a medical report showing that C.M. is allergic to pollen, dust mites, and pet dander.

Tammy Mourot, Greg's wife of two years, testified that she and Greg lived in a four-bedroom home with her three children (one in college, one just out of high school, and one teenager). She stated that the family goes to church "every time the doors are open." She recalled occasions where she went to Pamela's home to pick up C.M. According to her testimony, Pamela would allow him to go with her in the beginning, but there were occasions where she would not answer the door for twenty to thirty minutes. Pamela would also open the door, ask for a minute, then close the door, call Greg, and tell him, "she's not taking my son."

With the help of a calendar created by Tammy, Greg told the court that he was denied visitation on several different dates. He recalled a phone call from Pamela in April 2009, where she told him that Tammy and her children were not part of the Mourot family and that none of them were to ever watch C.M. again. He stated that he had only seen C.M. once since then. On cross-examination, Greg testified that Tuesday night visitation went well, but weekends did not.

Pamela acknowledged that C.M. missed sixty-six days of school the previous year, but she attributed his sickness to visits with Greg. She stated that C.M. would come home smelling like a dog, even though Greg knows that he is highly allergic to them. She stated that she talked to Greg about C.M.'s medications, but that Greg would not give C.M. any medicine and claimed that he knew better than the doctor. She also testified that Tammy had called and apologized to her about problems giving C.M. his medication.

Pamela acknowledged that Greg had not seen C.M. since May of that year, but she claimed that it was because he would not pick him up. She refused to take C.M. to Greg, as the

order instructed the person exercising visitation to pick him up. She also claimed personal knowledge that Tammy and Greg left C.M. alone with Tammy's then eleven-year-old daughter (an allegation Tammy denied).

After hearing the testimony, the court stated that it was awarding Greg custody of C.M. It noted the past citations for contempt for failure to allow visitation, and it thought that Greg could provide a good home for the child. The court particularly commented on the citations for contempt, stating that Pamela was making a mockery of the court's order. It also did not believe that C.M. had missed sixty-six days of school simply because he was sick from changing houses. The court entered an order reflecting its ruling, and this appeal followed.

Analysis

Pamela argues that Greg failed to prove a material change in circumstances to justify a change in custody. She contends that the excessive number of school absences was not a material change in circumstances given that the absences were excused and that many of them were accompanied by doctor's notes. She also contends that the denial of visitation did not justify the change in custody, as Greg failed to prove that she denied him visitation. She further asserts that the circuit court wrongfully punished her by awarding custody to Greg and that it failed to find that a change of custody was in C.M.'s best interest.

We review matters that traditionally sound in equity, such as domestic-relations proceedings, de novo on the record with respect to fact questions and legal questions.[1] Findings

[1] *Hudson v. Kyle*, 365 Ark. 341, 229 S.W.3d 890 (2006).

of fact will not be reversed unless they are clearly erroneous.[2] A finding of fact by the circuit court is clearly erroneous when, despite supporting evidence in the record, we are left with a definite and firm conviction that a mistake has been committed.[3] Further, we give great weight to the circuit court's personal observations; this is so because there are no cases in which the superior position, ability, and opportunity of the judge to observe the parties carry a greater weight than those involving the custody of minor children.[4]

The primary consideration in child-custody cases is the welfare and best interest of the child; all other considerations are secondary.[5] A judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the circuit court or not known by the circuit court at the time the original custody order was entered.[6]

Regarding the excessive absences, Pamela relies on our decision in *Davis v. Sheriff*,[7] which also involved a child with excessive absences. She quotes from our opinion:

Excessive absences, tardiness, and the lack of academic progress are matters that may be

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005).

[6] *Id.*

[7] 2009 Ark. App. 347, 308 S.W.3d 169.

> weighed by the trial court in determining the best interest of the child. However, given the evidence in this case, we agree with appellant that none of the concerns specifically listed by the trial court in its comments from the bench, either alone or in combination, constituted a material change sufficient to warrant a modification of custody.[8]

Pamela ignores two essential points from that opinion. First, she would have us completely disregard C.M.'s sixty-six absences despite our explicit statement that they should be considered in determining the best interest of the child. True, when considering absences, a court should consider the reasons for those absences, but the circuit court did not err in questioning whether all sixty-six absences were justified. Second, Pamela fails to consider the entire history both in *Davis* and here. In *Davis*, we affirmed the decision to change custody in light of another factor (the stepfather's conviction for child endangerment against his biological son). Here, we have a history of one parent denying visitation to the other parent. If anything, *Davis* supports the circuit court's decision to award Greg custody of C.M.

Next, Pamela focuses on the proof that she denied visitation. In her argument, she makes some valid points. A violation of court orders, by itself, does not compel a change in custody.[9] And custody is not to be changed merely to reward or punish a parent.[10] Pamela's multiple failures to comply with the court's orders, however, justify the court's decision. Greg's first motion for contempt was dismissed, but only because Greg agreed not to pursue it as long as Pamela allowed visitation. She was later found in contempt twice. A single failure to allow

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[8] *Id.* at 7, 308 S.W.3d at 172–73.

[9] *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003).

[10] *Id.*

visitation does not justify changing custody, but multiple failures do.[11] And even though Pamela points to inconsistencies in the record to support a finding to the contrary, our standard of review requires us to defer to the circuit court's finding that Pamela did indeed thwart Greg's efforts to exercise visitation.[12]

Pamela addresses each point of contention separately and argues how each individual finding does not support the circuit court's decision. But we do not examine each finding in isolation; certain factors, when examined together, may support the circuit court's decision where each factor, if examined in isolation, would not.[13] To that end, we hold that the factors cited by the circuit court—specifically the excessive absences and Pamela's history of thwarting visitation efforts—were sufficient proof of a material change in circumstances. Based on that same proof, combined with evidence showing that Greg can provide C.M. a good home, we hold that the circuit court properly awarded Greg custody of C.M. Accordingly, we affirm.

Affirmed.

ABRAMSON and HENRY, JJ., agree.

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[11] *See Brewer v. Smith*, 2010 Ark. App. 134, ___ S.W.3d ___ (affirming a change in custody based on the appellant's repeated failure to follow visitation orders and repeated, unfounded allegations of abuse); *Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007) (holding that the mother's repeated refusal to allow the father visitation when she decided visitation was not in the child's best interest, and her refusal to follow the circuit court's directives, constituted a record of continued alienation that was a material change of circumstances).

[12] *See Hudson*, *supra.*

[13] *Davis*, *supra*; *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999).