DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CA04-607

April 12, 2006

KIMBERLY IGNATIUK
APPELLANT

V.

MICHAEL IGNATIUK
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. DV99-1790]

HON. ELLEN B. BRANTLEY, JUDGE

AFFIRMED

This is an appeal from an order in which the Pulaski County Circuit Court changed custody of the parties' two minor daughters from appellant to appellee.[1] On appeal, appellant argues that the trial court divested her of custody of her children to punish her for violating previous orders of the court, and accordingly, the decision should be reversed. We affirm.

The parties were divorced on December 15, 1999, at which time the parties agreed that they would have joint legal custody of their two daughters, H.N.I. (DOB: 5-19-93) and H.D.I. (DOB: 1-5-98), with appellant having primary physical custody. Over the next four years, various motions were filed related to visitation, contempt, and other issues, as the parties' relationship grew increasingly more acrimonious. Ms. Shondra Aldridge, a clinical therapist for Centers for Youth and Families, began treating the children in March 2001, dealing with a range of issues that included allegations of sexual abuse by appellee.[2] Dr.

[1]This court originally ordered rebriefing in this case because of an insufficient abstract. *See Ignatiuk v. Ignatiuk*, CA04-607 (Jan. 26, 2005) (not designated for publication.)

[2]Appellee was acquitted of criminal charges on October 26, 2001, related to allegations of abuse against H.D.I.

Karen Young, a pediatric physician, examined the girls related to the allegations of abuse. On March 7, 2002, the trial court appointed Ms. Treeca Dyer to serve as attorney ad litem for the children. Following additional allegations and motions between the parties, on March 19, 2002, the trial court ordered the parties to submit to psychological evaluations to be conducted by Dr. Paul DeYoub. On August 29, 2002, the trial court entered an order liberalizing appellee's visitation provided that he and the children attend therapy sessions with Dr. Glen Lowitz, a clinical psychologist.

At some point, appellant remarried and moved with her new husband and the children to Florida, which prompted another round of motions, including allegations of frustration of visitation. At a hearing held on February 4, 2003, the parties read an agreement into the record that dismissed appellee's motion to change custody and to prohibit appellant's move to Florida, established a new visitation schedule for appellee, and provided that any violation of the agreement by appellant would be considered a material change of circumstances for the purpose of changing custody to appellee. That agreement was made part of an order entered by the trial court on April 11, 2003.

On July 9, 2003, Ms. Dyer, in her capacity as attorney ad litem, filed a motion for contempt against appellant, and on July 15, 2003, she filed a motion for a change of custody. On July 28, 2003, appellee filed his own motion for contempt against appellant and for a change of custody. On October 21, 2003, the trial court conducted a hearing on the motions. At the beginning of the hearing, appellant's attorney requested a continuance because appellant was allegedly unable to attend due to an ear infection that prevented her from flying or driving from Starke, Florida, to Little Rock, Arkansas. The trial court denied the motion and proceeded despite the absence of appellant and the children.

There was testimony from Dr. Lowitz, which in part dealt with a report prepared by Dr. Sharon L. Schulman that was entered into the record. Dr. Schulman is a licensed

psychologist who had been treating the children since their relocation to Florida. Not surprisingly, Dr. Lowitz's testimony heavily favored appellee, and Dr. Schulman's report heavily favored appellant. Appellee and his current wife also testified at the hearing. Appellant's counsel failed to present any expert witnesses to contradict their testimony, and he relied solely on previously entered medical reports. Following the testimony, Ms. Dyer spoke in her role as attorney ad litem for the children and expressed her frustration with appellant's lack of cooperation in providing vital information necessary for her to represent the girls' best interest. Ms. Dyer also commented that she was concerned that appellant might flee with the children. Appellee's attorney also reminded the trial court of the provision from the April 11, 2003 order incorporating the agreement between the parties and signed off on by the attorney ad litem, wherein the parties had agreed that any violation of the agreement by appellant, *i.e.*, contempt, would be considered a material change of circumstances for the purpose of changing custody to appellee.

In changing custody to appellee, the trial judge explained that she found Dr. Lowitz's testimony particularly persuasive and found Ms. Dyer's opinion to be reliable based on her experience as an attorney ad litem. The trial court's order was entered on December 28, 2003, and appellant filed her timely notice of appeal on January 2, 2004.

In reviewing cases that traditionally sound in equity, we consider the evidence de novo, but will not reverse a trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Alphin v. Alphin*, __ Ark. __, __ S.W.3d __ (Dec. 8, 2005); *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). We give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Hunt v. Perry*, 357 Ark. 224, 162 S.W.3d 891 (2004). This deference to the trial court is even greater in cases involving child custody, as a heavier burden is placed on the trial judge to

utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Alphin*, *supra.*

Arkansas law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Alphin*, *supra*. 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 trial court or were not known by the trial court at the time the original custody order was entered. *Id.*; *see also Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999). Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Alphin*, *supra*. The reasons for requiring these more stringent standards for modifications are to promote stability and continuity in the life of the child, and to discourage the repeated litigation of the same issues. *Id.* The party seeking modification has the burden of showing a material change in circumstances. *Id.* In addition, we may consider other testimony and conclude that there was sufficient evidence to support the trial court's transfer of custody. *See Campbell*, *supra*. Where the trial court fails to make findings of fact about a change in circumstances, this court, under its de novo review, may nonetheless conclude that there was sufficient evidence from which the trial court *could* have found a change in circumstances. *See Hamilton v. Barrett*, *supra*.

Appellant argues that the trial court changed custody in order to punish her for violating a prior order. She contends that significant friction developed between the attorney ad litem and herself, which resulted in multiple allegations of contempt. Appellant concedes that she has not been the model of cooperation in this matter, but she maintains that the fact that she, as a party seeking to maintain custody of her children, has violated a court order, is

only a factor to be taken into consideration by the trial court. It is not so conclusive as to require the trial court to act contrary to the best interest of the children. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). If such were not the case, the desire to punish a parent would override the paramount consideration in all custody cases, which is the welfare of the children. *See id*. She argues that the trial court went too far in changing custody and that a more appropriate result would have been the trial court's exercise of its contempt powers. *See id.*

Next, appellant argues that the trial court erred in relying so heavily on the testimony of Dr. Lowitz, and she claims that his testimony consisted mostly of conjecture. She points out that the trial court appointed him specifically for the purpose of re-establishing appellee's visitation with the children, and not surprisingly, his testimony regarding his sessions with the children were positive with respect to appellee's position. Although Dr. Lowitz had discussed the children's current treatment with Dr. Schulman and was aware of her recommendation that they remain in Florida, he disagreed with those findings and opined that appellant had caused H.N.I.'s depression and that appellant could not promote a healthy relationship between appellee and the children. She asserts that Dr. Lowitz's role in this case was limited, that he had very little involvement with her, and that he failed to contradict Dr. DeYoub's findings that appellant was not "embarking on a campaign to keep the children from their father" and was not detrimental to them. All Dr. Lowitz would say was that, based upon his discussion with Dr. DeYoub after the relocation, his impression was that Dr. DeYoub's opinion regarding the best interest of the children would have been different if he had known that appellant planned to move the children to Florida. Appellant contends that, without diagnosing the children's condition, evaluating appellant, or adequately rebutting the findings of Dr. DeYoub and Dr. Schulman, Dr. Lowitz merely offered speculation and

guesswork that was not supported by a preponderance of the evidence, and she asserts that his testimony should not have been relied upon by the trial court.

Appellant also argues that Ms. Dyer allowed her personal feelings to interfere with her advocacy on behalf of the children. Appellant admits that Ms. Dyer's frustration with her is understandable in light of the "fractious relationship" between them. She contends, however, that Ms. Dyer's comments at the October 21, 2003 hearing revealed that she allowed her frustration with appellant to compromise her objectivity. Specifically, appellant alleges that Ms. Dyer was unqualified to pinpoint the "strain" H.N.I. feels at appellant's home as the source of her post traumatic stress syndrome, when neither Dr. DeYoub nor Dr. Schulman placed the blame on appellant. Appellant also questions Ms. Dyer's changing position on the theory of "parental alienation syndrome." Apparently, Ms. Dyer questioned the validity of such a theory but then repeatedly discussed and attempted to obtain an opinion from Dr. Lowitz that supported the very position that appellant was alienating the children from appellee. Appellant acknowledges that Arkansas courts do consider whether one parent is alienating a child from the other parent when making custody decisions, *see Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997); however, she claims that if she were engaging in such behavior, the reports of Dr. DeYoub and Dr. Schulman would have supported such a theory, which is not the case.

Finally, appellant vehemently rejects the notion, as posed by Ms. Dyer, that she ever did anything that would raise a suspicion that she might kidnap the children and flee in order to keep them from appellee. She argues that Ms. Dyer raised this issue with the sole purpose of inflaming the trial court against her, and at that point she inappropriately ceased being an advocate solely for the children and assumed the role as advocate for appellee.

Appellant maintains that appellee failed to prove a material change of circumstances, reaffirming only that there was a great deal of animosity that clearly had existed between the parties for some time. She claims that he merely relied on the provision in the April 11, 2003 order that stated that a contempt finding alone would constitute a material change of circumstances. Appellant asserts that the provision was void ab initio because a contempt finding alone cannot be the basis of a change of custody. *See Carver v. May*, *supra*. She contends that the trial court wrongly relieved appellee of his burden of proof regarding a material change in circumstances by ratifying the void provision.

Although this is not a relocation case, the trial court could still weigh the impact that distance would have on the visitation and communication schedule, and the effect of such a move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas. Specifically, the trial court clearly determined that appellant was frustrating appellee's visitation rights, but more than that, focused on her complete lack of cooperation with both appellee and the attorney ad litem with regard to all types of vital information regarding the children. Add to that the facts that appellant failed to attend the hearing, failed to present evidence to counter appellee's and the attorney ad litem's allegations, and the evidence of the children's lack of progress, or even regression, since the move to Florida, and we find that there was sufficient evidence to support a finding that a material change in circumstances had occurred.

Appellee concedes that the mere violation of a court order is not sufficient to justify a change of custody but contends that when the disregard of a previous order results in damage to the welfare of the children, sufficient reason does exist. He circles us back to the best interest of the children and points out the unrebutted testimony of Dr. Lowitz. Contrary

to appellant's contention that Dr. Lowitz's role was very limited in this case, there was testimony of fairly extensive involvement that included testimony that:

> (1) He worked with appellee and the children on several occasions prior to the children's move to Florida;
> (2) He met with appellant prior to her relocation;
> (3) He observed behavior in both children prior to the move that indicated that appellant might be alienating them against appellee;
> (4) He met with the children on seven or eight occasions during spring-break visitation and noticed positive interaction with appellee;
> (5) He met with the children during Memorial Day visitation and noticed no adverse effect with respect to their visiting appellee and his wife;
> (6) Both children made statements to him about alleged abuse by appellee that were inconsistent, and both stated to him that appellant hated appellee;
> (7) He had studied Dr. DeYoub's reports and spoke personally with Dr. Schulman about the case and the effects that the move had had on the children.

There was significant unrebutted evidence provided by Dr. Lowitz, supported by evidence from appellee and his wife, to support the trial court's findings that there had been a material change in circumstances and that it was in the best interest of the children to make a change in custodial arrangements. This court recently stated that "a trial court is to exercise all its powers of perception in viewing the witnesses and their testimony when determining the best interest of the children." *Sill v. Sill*, __ Ark. App. __, __, __ S.W.3d __, __ (Feb. 15, 2006). The court further reiterated that a trial court can consider the custodial parent's interference with the noncustodial parent's visitation when determining the best interests of the child. *Id.*

The trial judge in this case made it very clear that she had leaned in favor of appellant when this matter originated and had been very concerned regarding the allegations of abuse. However, she also indicated that she had come to have quite a different picture of appellant and made a specific finding in her order that appellant moved the children to Florida in an effort to get them away from their father (appellee) and to keep them from having further contact with him through the court-implemented visitation. The trial judge specifically found that there had been a material change in circumstances since the entry of the agreed order of

April 11, 2003, based on the testimony of Dr. Lowitz, her own observation, and the recommendation of the attorney ad litem, sufficient to warrant a change of custody, and further, that it was in the best interest of the children to do so. Based upon our standard of review and the level of deference toward trial judges in these situations, we affirm.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.