DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ANDREE LAYTON ROAF, Judge

CA05-382

April 12, 2006

TONI GORDON APPELLANT v. TRACY W. GORDON APPELLEE	APPEAL FROM COLUMBIA COUNTY CIRCUIT COURT [NO. E-2001-299-2] HONORABLE EDWARD P. JONES, CIRCUIT JUDGE AFFIRMED

Appellant Toni Gordon appeals from the Columbia County Circuit Court's decision giving her ex-husband, Tracy Gordon, primary custody of their two children and ordering her to pay child support. Toni asserts that the trial court erred in concluding that the facts were sufficient to support a change of custody from joint custody. We find no error and affirm.

Tracy and Toni Gordon were divorced on March 21, 2001. On July 3, 2002, an order was entered reinstating a previous March 6, 2002, joint custody order, which contemplated neither parent having primary custody of their two children, but both parents sharing equal time and equal financial responsibility. On November 14, 2003, Tracy filed a petition to modify the custody order, alleging that there had been a substantial change in circumstances, including, but not limited to, the fact that Toni had not accepted her responsibilities as joint custodian and spent very few nights with the children. Tracy requested full custody and that he be awarded child support. The petition was not heard until December 1, 2004.

Tracy testified that he and Toni coordinated well when it came to caring for the children. He stated that, although he did not know how and when Toni decided to keep the children, he allowed

her to take the children whenever she wanted to do so. He also stated that the children were doing well in school and thriving and that he believed that Toni took adequate care of the children when they were with her.

Tracy, however, expressed concern over the fact that Toni exercised very little custody over the children during certain months and that he did not receive very much financial help from Toni. He testified that he provides all of the children's lunch money, clothing, and medical expenses, and that he provides everything that is necessary for the children's everyday care. He did, however, admit that Toni had purchased two sets of clothing for the children and provided the children with gifts on holidays and birthdays.

Both Tracy and Toni testified that they kept a calendar, and Tracy claimed that he wrote down where the children spent their time and that Toni only kept the children for six nights from June 2003 to November 2003; that Toni did not have the children at all in November 2003; and that she kept the children four times in December 2003, one night in January 2004, three nights in February 2004, six nights in March 2004, two nights in April 2004, five nights in May 2004, two nights in June 2004, two and a half nights[1] in July 2004, one night in August 2004, five and a half nights in September 2004, thirteen nights in October 2004, and six nights in November 2004. With the exception of October and November 2004, Toni agreed with Tracy's assessment of her time with the children.

Tracy and his mother also testified that Tracy lived near a lot of his relatives who spent a lot of time with the children, and that Tracy's father would often stay in Tracy's home with the children after school until after Tracy came home from work.

Toni testified that both she and Tracy currently worked the same shift at the David Wade Correctional Center, from 6:00 a.m. to 6:00 p.m. She stated that she was working the day shift from 7:00 a.m. to 4:00 p.m. when the original joint custody order was entered, but that she went to the

[1]A "half-night" refers to a night when Toni kept only one of the two children.

night shift in November 2003, from 6:00 p.m. to 6:00 a.m., and that affected her ability to exercise custody during bad weather. She stated that she had vehicle problems and that if no one were able to drive her to and from work she would have to stay in the bachelor's quarters at the Correctional Center for extended times.

Toni also stated that she and Tracy had a pretty good working relationship when it came to the children, and testified that they had even gone on vacation together since the entry of the April 2002 custody order. She also testified that, when the children are with her, they go to the park or rent movies and that she cooks for them and bathes them. In addition, she testified that it was true that Tracy had been the primary caregiver of the children since July 2002.

At the close of testimony, the trial court stated that it believed that, when Tracy and Toni decided that they wanted joint custody, they actually visualized Tracy being the primary custodian, with the children just visiting Toni. The court went on to state:

> Well, that is fine except that puts all the economic burden on him to raise the children and pay their expenses, and that is not really fair. So, I think what I need to do here today is make, according to the records, what in reality is really the case, and that is, order that the parties have joint custody, but that the plaintiff be primary custodian, and that the defendant have visitation of not less than what we call the visitation guidelines, more, if the parties agree, and that the defendant pay child support in accordance with our chart that we all have to go by, which . . . calls for child support in the amount of $145.00 per week.

Toni's argument on appeal is that the facts presented at trial are insufficient to support a change of custody and that the court abused its discretion and was clearly erroneous in finding those facts sufficient.

The court of appeals reviews child custody cases de novo, but does not reverse absent a finding that the trial court's decision was clearly against the preponderance of the evidence or clearly erroneous. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. Especially in child custody cases, the trial court

receives exceptional deference because of its superior position to evaluate and judge the credibility of the witnesses. *Id*.

It is well settled that the primary concern in child custody cases is the child's welfare and best interest; all other considerations are merely secondary. *Id.*; *Eaton v. Dixon*, 69 Ark. App. 9, 9 S.W.3d 535 (2000). Before a custody order can be changed, the court must be presented with proof of material facts which were unknown to the court at the time of the initial custody order or proof that conditions have so materially changed as to warrant a custody modification and that the best interest of the child requires it. *Carver*, *supra*. Between parents, a showing of unfitness is not necessary in order to warrant a change of custody. *Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002).

After the non-custodial parent has demonstrated a material change in circumstances, the court, rather than requiring the non-custodial parent to show an adverse impact on the child from the material change in circumstances, should weigh the material changes and consider the best interest of the child. *Calhoun v. Calhoun*, 84 Ark. App, 158, 138 S.w.3d 689 (2003).

Joint custody or equally divided custody of minor children is disfavored in Arkansas, although Ark. Code Ann. § 9-13-101(b) (1) (A) (ii) was amended in 2003 to specifically permit the court to consider an award of joint custody. *Dansby v. Dansby*, ____ Ark. App. ____, ____ S.W.3d ____ (June 30, 2004). The crucial factor bearing on the propriety of joint custody is the mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare. *Id*. Custody is always modifiable, but in order to promote stability and continuity for the children and to discourage repeated litigation of the same issues, our courts require a more rigid standard for custody modification than for initial custody orders. *Id*.

The fact that a parent had been the primary caretaker is a relevant consideration in determining custody of minor children. *See Milum v. Milum*, 49 Ark. App. 3, 894 S.W.2d 611 (1995). Primary custody is not in and of itself determinative; the essential consideration should be the best interest

of the child, and the selection of the custodian should provide stability and continuity in the child's environment. *Brown v. Cleveland*, 328 Ark. 73, 940 S.W.2d 876 (1997). While joint custody orders are disfavored, they may be awarded where the circumstances warrant it; again, the primary consideration is the best interest of the child, and if it is shown that the child's best interest is better fostered by divided custody, this is a proper order for the court to make. *Hansen v. Hansen*, 11 Ark. App. 104, 666 S.W.2d 726 (1984).

There are several factors to consider when determining the best interest of the child, including the psychological relationship between the parent and the child, the need for stability and continuity in the child's relationship with the parents and siblings, the past conduct of the parents toward the child, and the reasonable preference of a child. *Rector v. Rector*, 58 Ark. App. 132, 947 S.W.2d 389 (1997).

In *Drewry v. Drewry*, 3 Ark. App. 97, 622 S.W.2d 206 (1981), the appellate court affirmed an award of joint custody where both parents lived in the same community and could raise their child in his accustomed environment; each parent had the same time available to devote to the child; and each parent had been sharing equally in the nurturing and care of the child who had no emotional problems. In *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998), the court affirmed the modification of a joint custody agreement where the parents testified that they had never adhered to the joint-custody schedule but had alternated custody several times each week and where the record reflected that the parties could not cooperate regarding their child's health care. The court found that this discord was sufficient to warrant a finding of a material change in circumstances. *Id*.

This case is distinguishable from *Drewry*. In *Drewry*, the parents spent equal time with and provided equal support for the child. Here, although both parents worked the same schedule, Toni testified that her job prevented her from exercising as much time with her children as she would like. In addition, Toni admitted that Tracy had been the primary caregiver since July 2002, and the evidence suggested that Tracy provided for most of the financial needs of the children.

Toni appears to suggest that simply because the parties work well together and the children are well adjusted that the joint custody order should stand. Toni, however, ignores the fact that Tracy did establish a material change in circumstances in that, after the initial order of the joint custody agreement, Toni failed to exercise custody anywhere close to half of the time or to provide equal financial support as the order contemplated, a situation that persisted for over a year after Tracy's petition to modify custody was filed. In addition, Toni's argument that the joint custody arrangement is in the best interest of the children because they are currently thriving and have no problems is a double-edged sword, because what was proven to really be in the best interest of the children is Tracy having primary custody and Toni exercising visitation when her schedule allows. Toni also claims that the trial judge did not make any specific findings about a change in circumstances or what would be in the best interest of the children; however, where the trial judge fails to make findings of fact about a change in circumstances, this court, under its de novo review, may nonetheless conclude that there could have been a change in circumstances. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). Moreover, the trial court in open court and in the final order, actually continued the arrangement of joint custody with Tracy awarded primary physical custody to reflect the arrangement actually visualized and put into place by the parties for over a year and a half.

It cannot be said on these facts that the trial judge's modification was clearly erroneous. It is always in a child's best interest to spend as much time with both parents as possible and to receive financial support from both parents. The trial court's order does not leave us with the definite and firm conviction that a mistake has been made.

Affirmed.

PITTMAN, C.J., and GRIFFEN, J., agree.