ARKANSAS COURT OF APPEALS
SARAH J. HEFFLEY, JUDGE
NOT DESIGNATED FOR PUBLICATION

DIVISION I

CA 06-1022

November 14, 2007

BRENNA KEESEE	APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. E-2000-806]
V.		HONORABLE DAVID REYNOLDS, JUDGE
DAVID KEESEE	APPELLEE	AFFIRMED

On March 9, 2006, the Faulkner County Circuit Court entered an order changing custody of the parties' minor child from the mother, appellant Brenna Keesee, to the father, appellee David Keesee. Appellant now appeals this order, arguing that the trial court's decision was clearly against the preponderance of the evidence and should be reversed. We affirm the change of custody.

Appellant and appellee were divorced on June 3, 2003. Custody of their son, B.K., born June 19, 1997, was granted to appellant, subject to reasonable visitation by appellee, and appellee was ordered to pay child support in the amount of $68 per week. Over the next fifteen months, the parties returned to court several times to address the issue of appellee being in arrears on his child support payments. On December 3, 2004, appellee

filed a motion for contempt, alleging that appellant had willfully disregarded the court's order that he be given visitation and that he had not seen his son since January 5, 2004. Appellee asked the court to award custody of B.K. to him, and he also asked the court to postpone his obligation to make child support payments due to the fact that he was unable to work and was awaiting the outcome of a claim filed with social security disability.

A hearing was held on the matter, at which appellee testified that appellant was intentionally interfering with his visitation. He also testified that he was not able to drive long distances due to a back injury, and appellant would not allow his parents to pick up B.K. for him. In contrast, appellant testified that she had never kept appellee from seeing their son and that she had encouraged appellee to visit their son, but he did not do so. Another hearing was held on March 2, 2005, at which appellee testified that appellant had consented to visitation and then withdrawn consent on numerous occasions, including several times that appellee or his parents had driven to the child's home only to be denied the right to leave with the child. Appellant testified and denied preventing appellee from exercising visitation, and she explained that she had only denied overnight visitation due to medical issues with the child, including depression and separation anxiety, for which he was given prescription medication. Appellant testified that B.K. was currently under the care of Dr. David Blaske, a clinical psychologist, and Dr. Teresa Cisneros, a child psychiatrist. At the conclusion of the testimony, the court set another hearing date for April 6, 2005, and instructed appellant to have B.K.'s doctor there to testify. The court also

granted appellee's motion to reduce child support to the minimum ($24 per week) and reiterated that appellee was entitled to visitation. The order memorializing this decision, filed March 14, 2005, stated that appellee was to have overnight visitation "every weekend he is physically able to travel to Truman, Arkansas." The order also noted that appellee had orally withdrawn his motion for change of custody.

On March 15, 2005, appellee again filed a motion for contempt, alleging that appellant had failed to follow the court's directive from the March 2 hearing and had not allowed him visitation every weekend as ordered. The court ordered appellant to show cause at a hearing scheduled for April 6. At the hearing, the court heard testimony from Dr. David Blaske, who testified that he had been treating B.K. since February 2004. Dr. Blaske testified that both he and Dr. Cisneros recommended that: (1) the court appoint an attorney ad litem for B.K.; (2) visits with appellee should continue, with day visits on the weekends progressing to overnight visits as soon as possible; (3) individual and family therapy should continue to address concerns about B.K. and how to alleviate his anxiety. Dr. Blaske stated that although B.K. had a high level of anxiety over spending time with his dad, the anxiety would decrease as the time spent with his dad "becomes predictable and safe." Dr. Blaske explained that B.K. had been diagnosed with some mixed anxiety depression and ADHD, and his belief was that the parents' conduct may be contributing to B.K.'s problems. Dr. Blaske testified that he felt B.K. "would do fine if the chaos of these visitation issues were gone." Dr. Blaske stated that if both parents were loving,

consistent, and involved, B.K. would be fine, and "the goal … [is] to make that happen; get mom and dad working together better, communicating in [B.K.]'s best interest, not fighting over him, not playing games."

Appellee testified that the first weekend after the March 2 hearing, he had seen B.K., although his visitation hours were shortened at appellant's request, and appellee said he agreed because he wanted to avoid any confrontation with her. Appellee testified that when he called to schedule his visitation for the next weekend, appellant told him the visitation was supposed to be every other weekend. Appellee disagreed and told her the court order stated every weekend, but appellant contended that she had not gotten a copy of the court order and refused to let appellee bring her a copy of it. Appellee was able to exercise his visitation the third weekend after the March 2 hearing, although again for a shorter amount of time than ordered by the court. Appellee testified he had not had visitation since then, and he had visitation only two weekends out of the five weekends since the March 2 hearing.

Appellant testified that it was her understanding that visitation would be in accordance with the recommendation of Dr. Cisneros, B.K.'s psychiatrist, and that Dr. Cisneros's recommendation was that visitation occur every other weekend as opposed to the every-weekend visitation ordered by the court. Although appellant had been at the March 2 hearing, she stated that she was very distraught that day and could not recall exactly what the court had ordered. Appellant testified that she had not received a copy of

the court order, and she told appellee not to bring her a copy of the order because she was going out of town. She also testified that she had not heard from appellee from the time of his last visitation until the hearing that day.

At the close of the hearing, the court held a brief recess and typed out an order so the court could give the parties a copy before they left. The court ordered that visitation would commence the following weekend and would occur every other weekend, from 10:00 a.m. to 6:00 p.m. on Saturday and 8:00 a.m. to 6:00 p.m. on Sunday. The court also appointed Fran Scroggins as attorney ad litem for B.K. and continued the hearing on appellee's motion for contempt until May 3, 2005.

For reasons not clear from the record, a hearing was not held on May 3, but on May 18, a brief hearing was held at which an agreed order was entered allowing overnight visitation to commence. The order, filed May 20, stated that overnight visitation was to begin Saturday, May 21, from 10:00 a.m. until 6:00 p.m. on Sunday, May 22. Overnight visitation was to occur every other weekend.

On July 25, 2005, appellee filed a petition for contempt, alleging that Fran Scroggins, the attorney ad litem, had worked out an agreement between the parties concerning summer visitation. The agreement stated that appellee would have primary custody of B.K. during the summer, and appellant would have visitation every other weekend. Appellee alleged that appellant had picked up B.K. on July 8 and was supposed to return him two days later, but had never done so. Appellee had been unable to exercise

any visitation, including the weekend visitation ordered by the court on May 20. Appellee also filed a motion for change of custody, alleging that there had been a material change in circumstances in that appellant had refused to allow visitation and had tried to destroy any attempt by appellee to maintain a relationship with his son.

In her response to appellee's petition for contempt, appellant denied that she had agreed to the summer visitation schedule and argued that Scroggins had attempted to impose full summer visitation in favor of appellee without the approval of the court and contrary to the recommendations of B.K.'s therapists. Appellant also filed a response to appellee's motion for change of custody in which she denied interfering with visitation or attempting to harm appellee's relationship with B.K.

A hearing was held on the matter on September 7, 2005. Dr. Blaske testified that although visitation had been discontinued, he had never recommended that visitation be suspended, terminated, or modified in any way. Dr. Blaske also testified that he had not specifically recommended that the overnight visitation turn into a full summer visitation. Under cross-examination by Scroggins, Dr. Blaske stated that he had sensed from the beginning of the case that B.K. was "trapped in the middle of two parents that despise each other." Dr. Blaske testified that he could not point to anything specific indicating that B.K. had any problems staying overnight with his father during the summer, except for one bizarre story about his grandmother trying to poison him, which Dr. Blaske dismissed, noting that B.K. did have "some tall tales he'll tell occasionally." Dr. Blaske reiterated his

concern that B.K.'s anxiety stemmed from being in the middle of this "unfortunate situation."

Appellee testified that he had not seen his son since July 8, and between July 8 and July 23, he had called appellant between twenty and forty times and attempted to set up visitation. Appellee testified that appellant had told him she was not going to let him have visitation, and other times she just hung up the phone. According to appellee, appellant told him that B.K. was "having problems" and that she would call him back, but she never did.

After some dispute over what visitation the previous order had established, the court clarified that the overnight, every-other-weekend visitation was the minimum, and as contemplated in the order, the parties could agree otherwise. Regarding the plan for extended summer visitation, appellant testified that she did allow some additional visitation for a while, but that it was contingent on B.K.'s mental capacity and how he was dealing with it, and she felt like B.K. was regressing. Appellant testified that she tried to work out an alternate arrangement, with appellant having custody one week, appellee having custody the next week, and so on, but appellee did not agree. Appellant testified that appellee did not exercise his weekend visitation after July 8. Appellant stated that the only messages she received from appellee were requests for B.K. to call him, and there had been several instances where B.K. repeatedly attempted to reach his dad by phone but was unable to do so. Appellant also testified that Scroggins had told her that if she did not give appellee summer visitation, she would lose custody of her son.

Scroggins then called appellee back to testify, and he testified that at the meeting of himself, appellant, and Scroggins to plan the summer visitation, Scroggins had never said that custody would be taken away from appellant. Appellee also testified that according to phone bills placed into evidence, he had called appellant thirty-four times between July 8 and the present date.

As the final witness, the court heard testimony in-camera from B.K., who was eight years old at the time. B.K. testified that his dad was a good guy, but he was not sure if he had visited his dad this summer. B.K. told the court he had been trying to call his dad to ask him to visit, but he had been unable to get his dad on the phone. B.K. stated that the last time he went to see his dad, he was scared to go back, because his dad had "whooped" him with a belt with metal on it when he was five.

After hearing all the testimony, the court made the following ruling from the bench:

> I don't like many of the things that both of these parties have done throughout this case. I don't like the fact that they did things at the very beginning that were aimed at hurting each other and nothing else … if there was a place in a decent foster home to put these children, that's where – what I would do with [B.K.], but there's not. I'm disappointed in the way both of them have handled this. They have just practically ruined their child. And they are not going to get any better apparently. Now, the last times we've been here, I have made it clear that [B.K.] was to have visitation with his dad to reestablish their relationship and that's been thwarted again. So what I am going to do today is I'm going to change custody today. Visitation with Brenna will be what Mr. Keesee had before.

The court specifically noted that this was a temporary order, and the parties would have a final hearing on the matter at a later date. Appellant objected to the court's ruling and

argued that the court did not have jurisdiction to do what it had done. An order memorializing the court's decision was entered on September 15, 2005.

On December 15, 2005, appellant filed a motion for ex parte relief, alleging that she had received information that appellee was not providing appropriate care for their child. Specifically, appellant alleged that appellee had taken the child off of his prescription medication without medical advice or supervision. Appellant also stated that appellee was unemployed and that he and the child were living in an "attic" in appellee's parent's home that had no running water or bathroom facilities. In his response, appellee denied appellant's allegations and explained that the home where he and B.K. resided does have running water and bathroom facilities, but the room in which they reside does not have its own bathroom.

At a hearing held February 10, 2006, the court heard testimony from Kristy Kennedy, a licensed social worker who had been seeing B.K. since October 2005. Appellee took B.K. to Kennedy over concerns that he may have trouble adjusting to his new home. Kennedy testified that based on reports from appellee and B.K.'s teacher, her office had confirmed that B.K. probably did not need to be on medication. Kennedy testified she had conducted several family sessions with appellee and B.K., and one of the issues B.K. had to work out was his feeling that his father had a bad temper, which stemmed from the spanking B.K. had received when he was five years old. Regarding an eight-year-old's ability to remember an incident that occurred when he was five, Kennedy testified that it

was possible, but she was not sure that the incident had actually occurred. She stated that when she asked B.K. details about the incident, he could not give her details, and it was possible he was remembering the event because he was told that it happened.

Kennedy also reported that B.K. continued to express a desire to live with his mother, but that was normal when a child had formerly been in his mother's care and custody. Kennedy explained that her office had diagnosed B.K. with an adjustment disorder, which is usually a short-term diagnosis, but that this case had dragged on and on so that B.K. had been unable to put the past behind him, and he was "kind of in a limbo." Based on her observations of B.K.'s behavior, Kennedy stated that she did not believe that B.K. needed antidepressant medication or that he suffered from ADHD.

Appellee testified that B.K. missed his mom when he came to live with him after the September hearing, and appellee had complied with the court order for visitation and also granted extra visitation because he knew B.K. needed to see his mother. Appellee testified that since living with him, B.K. had made the honor roll in school and received a citizenship award for his conduct. B.K. was also participating in Cub Scouts, and appellee was the den leader. Appellee also planned to sign B.K. up for soccer the coming weekend. Appellee testified that he loved his son, and he felt it was in B.K.'s best interest to remain with him.

Appellant testified that she had not disobeyed any orders regarding visitation and that she had facilitated visitation to the best that she understood. Appellant reiterated that

she felt she had no choice but to agree to the summer visitation agreement and that she had stopped the summer visitation on her own initiative after B.K. returned home with a bad case of impetigo. Appellant denied stopping or attempting to stop the weekend visits that were ordered by the court. Appellant expressed her desire to retain custody of B.K. and testified that she would comply with the visitation order. Under cross-examination by Ms. Scroggins, appellant read an excerpt from a letter to the court, dated April 28, 2005, written by Drs. Blaske and Cisneros:

> During these sessions and through written communication the mother has indicated some anxiety related to the visits with the father. The mother's communication has indicated concerns related to [B.K.]'s ability to cope well with these visits. In a recent meeting with the father, he expressed the desire to initiate overnight visits and reported being pleased with how the day visits had gone to this point. He reported enjoying these visits and his time spent with [B.K.]. Within the individual therapy sessions, [B.K.] has not self-reported any anxiousness.

The court's final witness was B.K., who was again questioned by the court in-camera. B.K. indicated that he needed to go with his mom, but when asked why, he only responded, "Because." B.K. told the court he was making good grades and had received first place in his pack and second place overall in the Pinewood Derby. He also told the court he was able to visit his mom often, although he had not been to her new home in Malvern.

In its ruling from the bench, the court found that there had been a material change of circumstances and that custody should remain with appellee. The court stated that it was clear which parent would foster a relationship for the child with both parents, and it was

not appellant.

> I'm having to look at the way it would be better for [B.K.] to be in a home with a dad who is disabled and stays home twenty-four/seven practically or a mom, while [B.K.] was in her custody, was constantly ill, not ill but having all these anxiety problems, going to the doctor, counselors because of them, disregarded the Court's order when – it seemed to be at a whim, whenever she would decide [B.K.] didn't need to go see dad and then it would be months before any relationship was restored again.

In conclusion, the court granted custody to appellee and awarded appellant liberal visitation. The order memorializing this decision, filed March 9, 2006, explained that appellant's repeated failure to comply with the court's orders constituted a material change of circumstances sufficient to warrant a change of custody. Appellant then filed a timely notice of appeal to this court.

In child-custody cases, the primary consideration is the welfare and best interests of the child involved; all other considerations are secondary. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). Custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification is in the best interest of the child. *Id*. In cases involving child custody and related matters, we review the case de novo, but we will not reverse a trial judge's findings in this regard unless they are clearly contrary to the preponderance of the evidence. *Henley v. Medlock*, 97 Ark. App. 45, ___ S.W.3d ___ (2006). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id*. Because the question of whether the trial

court's findings are clearly against the preponderance of the evidence turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Sharp v. Keeler*, 99 Ark. App. 42, ___ S.W.3d ___ (2007). There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children. *Id*.

For her first point on appeal, appellant argues that the trial court erred in changing custody rather than using its power of contempt because there was no evidence of any material change of circumstance, and violation of court orders is not sufficient as the sole justification of a change in custody. It is true that this court has stated a trial court's contempt power should be used prior to the more drastic measure of changing custody, *see Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998); however, the trial court is not required to hold a party in contempt prior to a change of custody. Moreover, it is clear from the record that the court expressed its displeasure at appellant's failure to abide by the visitation order on multiple occasions.

We also agree with appellant's assertion that a violation of the court's previous directives alone does not warrant a change of custody. *Bernal v. Shirley*, 96 Ark. App. 148, ___ S.W.3d ___ (2006). The trial court must first determine that a material change in circumstances has occurred since the last order of custody, and if that threshold requirement is met, it must then determine who should have custody with the sole

consideration being the best interest of the child. *Id*. In this case, the court found that appellant's repeated failure to comply with the court's orders for visitation was a material change of circumstance, and the court made clear that it was placing B.K. in the care of the parent who would foster a relationship for B.K. with both parents, which was certainly in B.K.'s best interest. We find that this decision was not clearly against the preponderance of the evidence. *See Sharp v. Keeler, supra* (holding that mother's repeated refusal to allow father visitation when she decided it was in the child's best interest, and her refusal to follow the trial court's directives, constituted a record of continued alienation that was a material change of circumstances).

For her second point on appeal, appellant argues that the trial court's decision should be reversed because the issue of custody was not before the bench at the September 2005 hearing, and therefore appellant was not aware of the nature of the hearing and did not have the opportunity to present evidence against a modification of custody. To support this argument, appellant cites *Estes v. Masner*, 244 Ark. 797, 427 S.W.2d 161 (1968). In *Estes*, the supreme court reversed a change of custody from the mother to the father after the mother did not receive valid notice of a contempt hearing, and upon the mother's failure to appear, the court found the mother in contempt and modified custody. *Estes*, however, involved both the contempt hearing and the modification occurring on the same day, without the mother in attendance; in this case, the modification of custody at the September hearing was only a temporary order, and appellant had several months before

the final hearing in which to prepare an argument against a modification of custody. We also note that while appellant did object at the September hearing, arguing that the trial court lacked jurisdiction, appellant never raised a lack-of-notice argument to the court, and it is well-settled that this court will not consider arguments, even constitutional ones, raised for the first time on appeal. *Young v. State*, 370 Ark. 147, ___ S.W.3d ___ (2007). Accordingly, we find no merit in this argument and affirm.

Affirmed.

GLADWIN and BIRD, JJ., agree.