ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION IV

CA06-1393

June 27, 2007

KASEY PAYNE PHILLIPS

APPELLANT

V.

JOHN PAYNE

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, SIXTEENTH DIVISION
[NO. DV2001-526]

HON. ELLEN BASS BRANTLEY, JUDGE

AFFIRMED

The parties in this child-custody case were divorced and awarded joint custody of their minor children in 2001. The older child was born in 1996; the younger child was born in 2000. In 2002, appellee filed a motion for sole custody of the children. After a hearing, this motion was granted on December 2, 2002, in an order that also found appellant in contempt for failing for seventy-three weeks to pay court-ordered child support in the amount of $32 per week. Appellant was granted visitation on alternate weekends. In September 2005, appellant filed a motion to change custody. After a hearing on July 20, 2006, the circuit judge entered an order on August 9, 2006, that denied appellant's motion for change of custody and found appellant to be $10,000 in arrears on her child-support obligation. On appeal, appellant argues that she clearly proved a material change in circumstances and that it would be in the children's best interest to award appellant full custody of the children, and that the trial judge erred by failing to do so. We affirm.

We enumerated the principles governing the modification of custodial orders as follows in *Word v. Remick*, 75 Ark. App. 390, 395, 58 S.W.3d 422, 424 (2001):

> The primary consideration is the best interest and welfare of the child. All other considerations are secondary. Custody awards are not made or changed to punish or reward or gratify the desires of either parent. Although the [trial] court retains continuing power over the matter of child custody after the initial award, the original decree is a final adjudication of the proper person to have care and custody of the child. Before that order can be changed, there must be proof of material facts which were unknown to the court at that time, or proof that the conditions have so materially changed as to warrant modification and that the best interest of the child requires it. The burden of proving such a change is on the party seeking the modification.

The rules applied to appellate review of child-custody orders are likewise well settled. We consider the evidence de novo, reversing the trial judge's findings of fact only if they are clearly contrary to the preponderance of the evidence. *Eaton v. Dixon,* 69 Ark. App. 9, 9 S.W.3d 535 (2000). Because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the trial judge, especially in those cases involving child custody. *Anderson v. Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). We do so because we recognize that personal observation is of great value to a court that is called upon to choose between mother and father in a custody case. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). Trial judges in such cases must utilize, to the fullest extent, all of their powers of perception in evaluating the witnesses, their testimony, and the best interests of the children. We know of no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as much weight as those cases involving minor children. *Riddle v. Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989).

The trial judge in the present case has been involved with these parties since the original award of joint custody. She was presented with evidence that appellee had difficulty effectively disciplining the children, that the children had some behavior problems, that the children's cleanliness and grooming were inadequate, and that appellant had recently married and was now financially able to provide the children with a more comfortable home and amenities than could appellee. Most seriously, there was evidence that appellee spoke disparagingly of appellant in the children's presence and discouraged the children from developing a closer relationship with appellant. The trial court was also presented with evidence that appellant had voluntarily absented herself from the children soon after the award of joint custody, that appellant had moved numerous times during this period, that appellant had married for the third time, that appellant was $10,000 in arrears in child support, and that appellant had only within the past year begun to become more involved with the children.

In denying appellant's motion for a change of custody, the trial court noted that appellant had raised some valid concerns and ordered appellee to take parenting classes. Nevertheless, she found that the children had been doing well in appellee's care, that appellee was extremely stable in his employment, residence, and commitment to the children, and that this demonstrated stability outweighed the concerns raised by appellant. Clearly, the trial judge based her ruling, in substantial part, on her belief that appellant's unreliability would likely continue in the future and that the children would therefore not benefit from a change in custody. In light of the evidence and giving deference to the trial judge's familiarity with

and superior opportunity to judge the credibility of the parties, the trial court did not clearly err.

Affirmed.

ROBBINS, J., agrees.

HEFFLEY, J., concurs.

Sarah J. Heffley, J., concurring. Reluctantly, I agree to affirm the decision denying a change of custody out of deference to the trial judge's superior position to divine what is best for these children based on her long-term familiarity with the parties. I write only to emphasize the unacceptability of appellee's at-times egregious conduct, which appears to stem, at least in part, from his putting his personal resentments before the well-being of the parties' children.

Appellant proved that appellee has been making a serious effort to undermine her relationship with the children. Appellee told their nine-year-old daughter not to discuss with appellant a "me" project the child had been assigned at school. The child sought out appellant's assistance anyway, and when appellee found out, the child suffered the consequences of his displeasure. As a result of this kind of pressure, the daughter resorted to spelling words when conversing with her mother in the presence of her little brother so that he could not relay the content of their conversations to appellee.

On the daughter's birthday, appellant called her on appellee's cell phone only to be told by appellee that the child was elsewhere. This proved to be untrue, as appellee was with the child at a restaurant for a birthday celebration. Appellant reached her daughter by calling the restaurant and speaking with her on the restaurant telephone.

Appellant was not informed about the daughter's baptism. She was told only at the last minute about a church play.

When appellant noticed that the parties' daughter was developing body odor, she bought her deodorant. When the child began having oily hair and severe dandruff, appellant bought her dandruff shampoo. Appellee threw away the daughter's deodorant and dandruff shampoo because appellant had given those items to the child.

Appellant realized the daughter needed a winter coat and bought her one. Appellee discarded it.

Appellee regularly discussed with the children appellant's delinquency in child support. He claimed he did this in order to teach the children responsibility. He also discussed the delinquent child support when the children asked for things that he could not afford.

Of perhaps greater concern are the behavioral problems exhibited by the parties' six-year-old son, who was prone to temper tantrums. The child's disruptive behavior had caused him to be expelled from pre-kindergarten. When angered, the son called appellant vile names – appellations that only could be learned from an adult. The children's ad litem, who recommended a change of custody, felt that the son was mimicking the behavior of appellee, whom she described as having anger and control issues.

There was evidence showing that there was a physical altercation between appellant and appellee during a visitation exchange that erupted when appellee refused to give appellant a receipt for cash she was giving him for the children. While the audio tape of this incident does not confirm which party was the aggressor, their daughter is heard to exclaim that she saw appellee choking the appellant. This incident was reported to the police, as was another one that happened in the recent past. The daughter also testified that appellee became angry when she and her brother did something wrong, like spill a drink. She said that appellee threw things and knocked over tables when he was mad. Appellee had left bruises on their son's back and buttocks when spanking him.

In advocating a change of custody, the ad litem believed that appellee had downplayed the son's behavioral problems and that he was alienating the children from appellant. The ad litem also felt that appellee's discipline of the children was too extreme, and she pointed out several instances where appellee's testimony was not truthful.

The trial judge in this case found that appellant had proven a material change in circumstances but determined that a change of custody was not in the children's best interest. Our standard of review compels me to affirm this decision, although I find it troubling. Appellee's conduct was shown to be deplorable and to have adversely affected the children. On balance, however, appellant left the children with appellee years ago, only reestablishing regular visitation with them in the past year. She is woefully behind in her child support payments and had been married to her third husband for less than two years at the time of the trial judge's determination. Yet also, appellant has custody of the child from her second marriage, and there was no evidence that she has been anything but a good mother. Appellant's husband is gainfully employed, of good character, and supportive of appellant's decision to seek custody. Appellant and her husband live in a home that has room for all of the children.

The trial judge remarked that her ruling may have been different if appellant had a longer history of stability. Appellee should not feel vindicated by either the trial judge's or this court's decisions, because it is only by the thinnest of reeds that he has maintained custody of the children. His behavior and attitude are not acceptable, and for the sake of the children, he must do better.