

NOT DESIGNATED FOR PUBLICATION

DIVISION II

CA07-175

BRANDY KOPP

OCTOBER 31, 2007

V. APPELLANT

APPEAL FROM THE LAWRENCE
COUNTY CIRCUIT COURT
[NO. DR 2003-200]

DANNY KOPP

HON. KEVIN NEIL KING,
CIRCUIT JUDGE

APPELLEE

AFFIRMED

Brandy Kopp appeals from an order of the Lawrence County Circuit Court changing custody of the parties' minor child, CK, to appellee Danny Kopp and ordering that Brandy's other child from a previous marriage, ZM, not be present when she exercised her visitation with CK. On appeal, Brandy argues that the trial court's findings that there had been a material change of circumstances and that it was in the best interest of CK to change custody was clearly against the preponderance of the evidence. She also argues that the restriction on visitation should be lifted because there was insufficient evidence to "warrant indefinitely isolating the two siblings." We affirm.

Brandy and Danny were divorced on July 21, 2004. Pursuant to an agreement by the parties, Brandy was awarded custody of CK, whose date of birth is January 28, 2002. On June 5, 2006, Danny filed an ex parte petition to change custody, alleging that CK had been repeatedly injured by his half-brother, ZM. ZM is approximately five years older than CK.

The petition also alleged that Brandy had been inattentive to CK's medical needs, refused to provide Danny with her current residential address and phone number so that he could contact the minor child, and was residing with a man to whom she was not married. The trial court granted the petition.

Hearings on a petition for a permanent change of custody were conducted on August 7, 2006, and September 11, 2006. Danny testified that ZM had displayed aggressive behavior that dated back to a time when he was still married to Brandy. He recalled one incident when ZM was "sitting out in a swarm of bees, cutting stingers off them." He noted that at that time, ZM had behavioral problems at school. However, rather than have ZM submit to psychological testing, Brandy withdrew the child from school and went to live with her mother. The marriage ended shortly thereafter.

Danny stated that although he had agreed to give Brandy custody of CK in their divorce, he recently had concluded that custody had to be changed. The watershed event was his discovery on May 26, 2006, that CK had sustained an injury to his penis that he believed was caused by ZM. The injury was first discovered by Danny's mother, Susan Kopp, when she took the child to the bathroom just before Danny, who was employed as a pilot, flew to Illinois with CK and his parents. Susan informed Danny about the injury, and he asked the child what had happened. According to Danny, CK told him that ZM hit his penis with a "blue board." Danny noted that CK also claimed that his penis injury was a "mosquito bite," but he rejected that explanation. Danny took pictures of the injury, and the pictures were admitted into evidence. Danny attempted to contact CK's regular physician, but when he

was unable to do so, he had the child examined by Dr. Mark Brown, who prescribed antibiotics. Danny stated that CK was a small child, so he expected him to have “cuts and bruises,” but he opined that they seemed to be getting worse in the six months prior to his discovery of the penis injury. A series of pictures that depicted bruises and abrasions to the child’s extremities, face, and torso were also admitted into evidence. Danny further alleged that Brandy was negligent in attending to CK’s vision problems, and he had encountered repeated problems with making sure that CK had functional glasses.

After the Memorial Day visit, Danny returned CK to his mother’s custody at the usual exchange location, the Randolph County Sheriff’s Office. Danny attempted to give Brandy’s mother, Ann Hedge, a letter for Brandy asking her for information about what happened to CK. He also attempted to give her the medication that Dr. Brown had prescribed. Hedge refused to accept the letter and the medication. Danny then called the child maltreatment hotline. According to Danny, since he was given custody pursuant to the ex parte order, CK has not had any further injuries.

Dr. Brown confirmed that CK told him that his penis injury was caused by ZM when he hit him with a blue board. Dr. Brown opined that the injury he observed was consistent with being struck with an object. Susan Kopp also corroborated Danny’s testimony regarding the discovery of CK’s penis injury. Stan Rogers of the Arkansas State Police Crimes Against Children Division investigated the penis-injury incident, and CK also told him that ZM hit his penis with a board. Rogers noted that CK also stated that another

individual named Kendall “pinched his penis.” Additionally, Rogers testified that CK told him that ZM “hits him.”

Danny also presented the testimony of several witnesses who testified about ZM’s aggressive behavior. Tina Hoggard, ZM’s kindergarten teacher, testified that ZM had been a discipline problem when he was in her class, and she recalled a specific incident where he stabbed a bug with a stick and placed the bug in his pocket. Brenda Ray, a counselor in Imboden, testified that she treated ZM in 2002 pursuant to a referral from his school due to his “aggression towards other children.” Ray stated that ZM’s behavior initially improved, but then he regressed. According to Ray, Brandy rejected her recommendation that ZM undergo psychological testing and discontinued Ray’s treatment of the child. Phyllis Cook, ZM’s school counselor, confirmed the story of ZM “hurting” other children before Brandy took the child out of school. She expressed concern with ZM living in the same household with CK “if [ZM] continues to exhibit the behaviors that he was exhibiting at the time that [she] knew him.”

Katrina Casteel, a therapist in Northeast Arkansas, stated that she began treating CK and ZM in March 2006. ZM was referred to her from his school for “anger issues.” She recalled from her intake session that Brandy acknowledged that ZM “had some anger, anger outbursts, distractibility, and some oppositional behavior” and that she first noted these behaviors “at a very young age.” ZM related that interaction in his mother’s household was “mostly yelling at each other.” Casteel also noted that ZM lied during the sessions and that she had noted “some concerns about physical mistreatment” in her records. Regarding the

penis issue, Casteel stated that Brandy told her that CK attributed the injury to a bee sting or that “maybe his cousin did it.” She stated that CK related the same story to her. Casteel stated that she did not “see any threat of [ZM] hurting [CK].”

Bobby Main, ZM’s father, testified that he was previously married to Brandy, and they remarried after Brandy was served with Danny’s petition to change custody. Main admitted that he cohabitated with Brandy in the presence of CK prior to their current marriage. He stated that he was a self-employed carpenter who was building a house for his father “when the pain allows [him] to work.” He explained that he was injured in an automobile accident some years before. Main admitted that he was convicted of felony methamphetamine possession and currently had a DUI conviction on appeal.

Main claimed that he was in a position to observe ZM and CK together, and he had never seen ZM injure CK. He doubted that ZM would hurt CK and stated that it was usually CK “picking” at ZM. He claimed that Brandy was a “wonderful mother” and that she is able to “control” ZM and CK “very well.” He acknowledged that ZM was four years older than CK and that CK had a “big weight disadvantage.”

Paula Hedge, Brandy’s sister-in-law, testified that she heard CK tell Brandy that a cousin on Danny’s side of the family, not ZM, hit his penis with a board. She claimed that CK also stated that he was stung on his penis by a bee. She opined that ZM was “a complete and total boy,” and the only time she had ever seen ZM “be aggressive is when he is aggressed [sic] upon and needed to protect himself.”

Ann Hedge testified that she did not observe the penis injury when she made CK change his underwear just prior to the Memorial Day weekend visit. Furthermore, she did not believe that ZM was a “danger or threat” to CK. She conceded that CK and ZM “rough-house and argue and wrestle,” but denied that they get into “anything volatile.” She further stated that, “if anything, ZM would be more likely to be injured by CK.” She admitted that she had filed harassment charges against Danny and was aware that he was ordered not to have contact with her. Nonetheless, she was the primary person who conducted the exchange of CK for visitation.

Brandy testified that CK told her that his penis injury came from a bee sting. She claimed that the injury was not as bad as the pictures showed. She also claimed that had her son had the injury to his penis prior to the Memorial Day visit with his father, either she or her mother would have noticed when she dressed him. She asserted that CK and ZM have “good relationship” although she admitted that “they fuss and feud sometimes.” She accused Danny of trying to frame her by putting drugs and money in her van. Brandy did, however, admit that she cohabitated with Main before she remarried him, and she conceded that it violated the court order when she did.

The trial court permanently changed custody of CK to Danny and restricted Brandy’s visitation to times when ZM was not present in the home. The order contained extensive findings of fact, including a determination that ZM’s behavior had become “severe,” “[ZM’s] conduct with [CK] places [CK] in danger unless closely supervised by [Brandy]” and that “[Brandy] has failed to closely supervise the conduct of [ZM] with [CK].”

Before we consider Brandy's three points on appeal we note our standard of review. In child-custody cases, the primary consideration is the welfare and best interests of the child involved; all other considerations are secondary. *Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003). We review the case de novo, but we will not reverse a trial judge's findings in this regard unless they are clearly erroneous. *Id.* A finding is clearly erroneous 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 erroneous 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 interests. *Id.*

Brandy first argues that the trial court's finding that there has been a material change of circumstances since the entry of the divorce decree is clearly against the preponderance of the evidence. Specifically, she asserts that the trial court's finding that ZM's behavior had deteriorated to the point that it alone constituted a material change of circumstance was erroneous "because the court should not have relied on the evidence of ZM's past behavioral problems because such evidence predates the original divorce decree." Brandy further argues that the trial court erred when it found that ZM injured CK because CK gave conflicting explanations as to the etiology of his penis injury, and therefore the trial court "arbitrarily chose one explanation over the other." We disagree.

Brandy's argument that the trial court erred in its finding the deterioration of ZM's behavior a change in circumstances mischaracterizes the proof in this case. We interpret the

testimony of Tina Hoggard, Brenda Ray, and Phyllis Cook as merely establishing that ZM had long-standing and well-documented proclivity for aggressive behavior against other children. This proof provided a baseline for the trial court's finding that ZM's aggressive behavior had worsened. Moreover, there was also a changed circumstance in that Brandy was failing to protect CK from a known threat to CK's health and well-being. Additionally, we note that Danny presented proof in the form of photographs that established that CK had been injured in the six months prior to the filing of his ex parte motion to change custody, which was well after the entry of the divorce decree.

We also find no merit in Brandy's contention that the trial court's finding that ZM injured CK was "clear error." As noted previously, CK's statements as well as Danny's photographic evidence proved that CK was being injured during the six months prior to the entry of the ex parte order. There was also proof that established ZM's proclivity for hurting other children and this problem had not been adequately addressed by psychological counseling or other treatment, save for Brandy's claim that ZM was now taking medication for attention deficit disorder. Finally, testimony by Main and others established that ZM had the size and age advantage to overpower CK. Under these circumstances, we cannot say that the trial court clearly erred in finding that ZM had injured CK.

Finally, we acknowledge that Brandy is correct when she asserts that CK gave alternative explanations for how his penis was injured. However, the bee sting and mosquito bite explanations were rejected by Dr. Brown, and indeed all of the witnesses who gave opinions in this case. This left the trial court with the choice between whether to believe that

CK's penis was injured by ZM or by some other individual. The testimony revealed that CK had implicated ZM in statements made to Danny, Dr. Brown, and Steve Rogers. While CK's statements may also have implicated a child named KP, who is CK's and ZM's third cousin, the trial court heard testimony from KP's mother, Scarlet Prince, who vehemently denied that KP had any contact with CK prior to Memorial Day. Conversely, CK's attribution of his injury to contact with a member of Danny's side of the family was purportedly made to Ann Hedge, Paula Hedge, and Brandy, and to Katrina Casteel, but only after Brandy told her that CK told her that his cousin was the perpetrator. In situations like this, it is well-settled law that we defer to the trial court to resolve inconsistencies in the testimony. *Id.*

Brandy next argues that the trial court's finding that the best interest of the child warrants a change in custody is against the preponderance of the evidence. She again asserts that "no real evidence ties [ZM] to [CK's] injury." Furthermore, citing *Freshour v. West*, 334 Ark. 100, 971 S.W.2d 263 (1998), Brandy asserts that Arkansas law favors keeping siblings together "unless exceptional circumstances are involved." She also asserts that the trial court made a best interest determination based on the relative financial condition of the parties, which she claims violates the holding in *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003). We find no merit in these arguments.

We have previously addressed Brandy's contention that there was "no real evidence" that ZM was harming CK. Although much of the proof was circumstantial, we cannot hold that the trial court's findings were clearly against the preponderance of the evidence. Given the finding that one sibling was injuring another, we hold that it is precisely the exceptional

circumstances that warrant separating siblings. Best interest of the child is always the paramount concern in making custody determinations. *Walker v. Torres, supra*. As to Brandy's argument that the change in custody was made because Danny had superior financial means, we can find no support in the record that the trial court changed custody for this reason.

Lastly, Brandy argues that the no-contact provision between ZM and CK should be lifted because the evidence presented is insufficient to warrant "indefinitely isolating the two siblings." She asserts that Danny never requested this "extreme relief" in his pleadings, and while Danny did make such a request on the witness stand, he failed to give her proper notice to pursue this remedy. We also find this argument unpersuasive.

Setting visitation rights is a matter that lies within the sound discretion of the trial court. *Crosby v. Crosby*, 97 Ark. App. 316, ___ S.W.3d ___ (2007). The main consideration is the best interest of the child. *Id.* In *Crosby*, we affirmed a trial court's decision to exclude step-siblings from the place where visitation was being exercised after allegations of sexual abuse that had not been thoroughly investigated were lodged against them. We held that the best interest of the child dictated that the child not be subjected to sexual abuse by other children in the non-custodial parent's home. Likewise, in the instant case, we hold that best interest of the child dictates that CK not be subjected to physical abuse by ZM when Brandy exercised visitation. As in *Crosby*, we believe that the restriction on visitation was sound exercise of the trial judge's discretion.

Finally, regarding Brandy's inadequate notice argument, we are unable to find in the abstract where Brandy has raised that argument to the trial court. On appellate review, issues of even constitutional dimension are waived if not first presented to the trial court and a ruling is obtained. *See Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999). Accordingly, we decline to consider this argument.

Affirmed.

GLOVER and MILLER, JJ., agree.