

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., Judge

DIVISION II

CA07-03

29 August 2007

JERRY HENDRIX,

APPELLANT

v.

JENNIFER WALTERS,

APPELLEE

AN APPEAL FROM THE OUACHITA
COUNTY CIRCUIT COURT

[DR-2004-201-3]

THE HONORABLE EDWIN A.
KEATON, CIRCUIT JUDGE

AFFIRMED

Jerry Hendrix appeals the circuit court's denial of his petition to modify custody of his and Jennifer Walters' two-year-old son, P.H. In the same order, the court held Jennifer in contempt for willfully violating prior visitation orders; she does not challenge that ruling on appeal.

To change custody, Jerry had to prove a material change in circumstances since Jennifer was awarded custody and that changing custody was in the boy's best interest. *Middleton v. Middleton*, 83 Ark. App. 7, 14–15, 113 S.W.3d 625, 629

(2003). In its bench ruling, the circuit court concluded that Jennifer's bad faith and unwillingness to cooperate with Jerry on visitation constituted a material change in circumstances. It found further that her sudden move to Nebraska was unreasonable because of her lack of planning or discussion with Jerry before moving. But the court did not modify custody. It found instead that changing custody was not in the boy's best interest because Jerry had interfered with Jennifer and their son's relationship by denying phone visitation too.

Jerry argues that the circuit court clearly erred by finding that changing custody was not in the boy's best interest. He testified that P.H. was often dirty, smelled bad, and lacked a change of clothes or diapers when Jennifer dropped him off for visits, and that she denied him phone visitation. He argues Jennifer's 1000-mile move forced Jerry to miss some visits and showed a disregard for his father-son relationship with the child. Jerry points out that he has remarried and established a stable family home in Arkansas.

Jennifer urges us to affirm, arguing that her behavior was not as extreme as the parent's conduct in *Carver v. May*, where the court changed custody after the mother became "combative, uncooperative, and hostile concerning [the father's] parental rights." 81 Ark. App. 292, 297, 101 S.W.3d 256, 259 (2003). She notes that the circuit court found that Jerry also withheld her phone calls from their son, and that

a desire to punish either parent should not guide the court's best-interest analysis. She says that moving to Nebraska resulted in positive changes in her life: she earns \$10,000 more at her job there than she did in Arkansas; P.H. gets along well with his five-year-old sister; and a family member cares for the boy while Jennifer works.

The circuit court's refusal to modify custody was not clearly against the preponderance of the evidence. *Carver*, 81 Ark. App. at 296, 101 S.W.3d at 259. We agree that Jennifer's contumacious disregard for Jerry's visitation rights was unreasonable and constituted a material change in circumstances. As to discerning what was in this child's best interest, the circuit judge was in the best position to evaluate the witnesses (including the boy's parents, sister, and grandmother) and weigh the testimony. *Ibid*. We defer to the court's reasoned judgment not to change custody, which also finds support in our law's presumption against separating siblings, such as P.H. and his young sister. *Middleton*, 83 Ark. App. at 15, 113 S.W.3d at 630.

Affirmed.

BIRD and HEFFLEY, JJ., agree.