NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA07-419

KELLY SULLIVENT (WHITMER),	**Opinion Delivered** 18 June 2008
APPELLANT	APPEAL FROM THE CALHOUN COUNTY CIRCUIT COURT, [NO. DR-2002-27]
v.	
JEROMY SULLIVENT,	HONORABLE LARRY W. CHANDLER, JUDGE
APPELLEE	AFFIRMED

D.P. MARSHALL JR., Judge

This is a custody case. Kelly Whitmer challenges the circuit court's order ending her joint custody of E.S., G.S., and T.S. (ages nine, seven, and six) with Jeromy Sullivent (her former husband and the children's father) and granting Sullivent sole custody subject to her visitation. We certified this appeal to the supreme court because one of Whitmer's points alleged error in the circuit court's refusal to disqualify Sullivent's lawyer. The supreme court decided a jurisdictional issue about the timing of Whitmer's notice of appeal in her favor, rejected Whitmer's disqualification argument, and returned the case to us for a decision on the remaining issues. *Sullivent Whitmer v. Sullivent*, __ Ark. __, __ S.W.3d __ (1 May 2008). All those issues concern the change-of-custody proceedings, which were lengthy and heated. The supreme

court's opinion discusses most of the material facts. We supplement that discussion as needed.

First, we address the main point: the custody change. Whitmer argues that the circuit court's order changing permanent custody of the children to Sullivent was clearly against the preponderance of the evidence. To change custody, Sullivent had to prove a material change in circumstances since Whitmer was awarded primary physical custody and that the change was in the children's best interest. *Middleton v. Middleton*, 83 Ark. App. 7, 14–15, 113 S.W.3d 625, 629 (2003). The circuit court concluded that Sullivent carried these burdens, and we see no clear error in either conclusion. *Carver v. May*, 81 Ark. App. 292, 296, 101 S.W.3d 256, 259 (2003).

Whitmer says that what she calls her mistakes did not amount to a material change in circumstances warranting a change in custody. These mistakes center on her marriage to Keith Whitmer in September 2003—a few weeks after she signed an agreed order stating that Keith would not be present around the children. Whitmer filed for divorce from Keith in February 2004. Then in the summer of 2004, while high on methamphetamine, Keith beat Whitmer and stabbed her in the stomach with a barbeque fork. She was eight months pregnant. Whitmer described part of the attack in an affidavit that she filed with the prosecutor: "[Keith] told the kids to enjoy their time with me because you will be living with your daddy forever. He told me this was the last time I would ever see my kids. After my kids left, he started hitting

me with a shower rod." About one month after being attacked, Whitmer dismissed her divorce complaint against Keith. She later filed a new complaint and eventually divorced Keith in July 2006.

We accord the circuit court great deference in this kind of case. *Alphin v. Alphin*, 364 Ark. 332, 336, 219 S.W.3d 160,162 (2005). After hearing two days of testimony, the circuit judge wrote a seven-page opinion carefully detailing the key events and his reasons for changing custody to Sullivent. He determined that Whitmer's marriage to Keith and her failure "to take steps [in June 2004] to protect her children from [Keith] until he had been afforded the opportunity to inflict potentially devastating psychological abuse on all three children" constituted material changes in the circumstances. For the children's safety and security, the circuit court found that it was in their best interest to be in Sullivent's custody. The record amply supports all these findings.

In a related point, Whitmer contends that by changing custody the circuit court violated her constitutional right to marry whomever she wanted. Whitmer is mistaken. The circuit court listed Whitmer's marriage to Keith as one of several material changes in circumstances. Whitmer married him within a month of agreeing to keep her children away from him. She then subjected the children to his violence and dropped her divorce complaint against him even after he beat and stabbed her in front of the

children. The court never ordered Whitmer not to marry Keith. She exercised her fundamental right to marry him. But her choice endangered her children, and the circuit court correctly weighed that circumstance.

Whitmer next makes three arguments about a 2004 ex parte order which gave temporary custody of the children to Sullivent. The circuit court entered this order a few days after the barbeque-fork stabbing. Whitmer argues that Sullivent's petition for the order was defective because it was verified by his attorney, not Sullivent. Whitmer's affidavit, which we have quoted from, was attached to the petition. She also argues that the circuit court did not give her a timely hearing after it entered the order. Whitmer also claims that, when the parties got to the hearing, the circuit court rejected her attempt to challenge the ex parte order because the case was set for a final hearing in a couple of months and the court did not want to piecemeal the issues. We note that the final hearing date was eventually continued. Almost two years passed before the circuit court held the final hearing.

The later developments in this case moot Whitmer's challenges on appeal to this interim order. *Vairo v. Vairo*, 27 Ark. App. 231, 234, 769 S.W.2d 423, 424 (1989); *Trammel v. Isom*, 25 Ark. App. 76, 78–79, 753 S.W.2d 281, 283 (1988). The circuit court permanently changed custody of the children in November 2006—more than two years after the court entered the ex parte order. The final order superseded the

ex parte order. Whitmer must therefore show prejudice in the final order resulting from the alleged errors that she asserts in the ex parte order. *Cf. Jones v. Jones*, 326 Ark. 481, 492–94, 931 S.W.2d 767, 772–74 (1996). Without evidence showing that irregularities in that interim hearing and order caused the trial court to err in determining that it was in the children's best interest for their father to have permanent custody, any error in those interim proceedings was harmless. *Trammel*, 25 Ark. App. at 79, 753 S.W.2d at 283. Given the many considerations on which the court based its award of permanent custody, and the many events that occurred after the ex parte order and before the permanent order, we discern no prejudice. Because a decision on the merits of the ex parte temporary order would therefore have no practical effect now, the matter is moot. *Vairo*, 27 Ark. App. at 234, 769 S.W.2d at 424; *Trammel*, 25 Ark. App. at 79, 753 S.W.2d at 283.

Whitmer next attacks another interim order. In February 2006 she filed an emergency motion for an immediate temporary change of custody. The circuit court held a hearing that month and denied her motion. Whitmer's argument on this point fails for the same reason that her arguments about the 2004 ex parte order fail. The 2006 order was a temporary order, which the permanent-custody order superseded. Whitmer's argument here is moot too. *Vairo*, 27 Ark. App. at 234, 769 S.W.2d at 424; *Trammel*, 25 Ark. App. at 79, 753 S.W.2d at 283.

Whitmer's last contention is about an evidentiary ruling. She argues that the trial court erred by denying her motions to dismiss Sullivent's petition for a change of custody because of Sullivent's repeated and intentional delays in responding to discovery. Whitmer moved to dismiss the case in May 2006 and again in August 2006 on the first day of the final hearing. The record does not indicate that the court ruled on her first motion, but it denied her second motion at the beginning of the permanent-custody hearing.

The circuit court has wide discretion to impose sanctions, including dismissal, for a party's failure to comply with discovery. Ark. R. Civ. P. 37(b)(2)(C); *Calandro v. Parkerson*, 333 Ark. 603, 610–12, 970 S.W.2d 796, 801 (1998). Dismissal, however, is an extraordinary sanction for extraordinary circumstances. *Coulson Oil Co. v. Tully*, 84 Ark. App. 241, 252, 139 S.W.3d 158, 164 (2003). This record reveals no such circumstances. Whitmer complained to the circuit court that she had endured two years of discovery abuse by Sullivent. But she did not move to dismiss his petition to change custody permanently until two months before the final hearing, and even then did not request a hearing on her motion. After Whitmer filed her second motion—the morning of the final hearing—the court denied it, concluding that it was a belated attempt to enforce the discovery rules. We see no abuse of discretion in these circumstances. *Rush v. Fieldcrest Cannon, Inc.*, 326 Ark. 849, 854–56, 934 S.W.2d 512,

515–16 (1996).

Affirmed.

HEFFLEY and BAKER, JJ., agree.