

DIVISION III

ARKANSAS COURT OF APPEALS

No. CA07-445

JAMES CHRISTOPHER LUEBKE
APPELLANT

V.

VIRGINIA LUEBKE
APPELLEE

Opinion Delivered November 28, 2007

AN APPEAL FROM PULASKI
COUNTY CIRCUIT COURT
[DR 2005-176]

HON. VANN H. SMITH, JUDGE

REVERSED AND REMANDED

WENDELL GRIFFEN, Judge

James Christopher Luebke appeals from an order denying his request to change custody of his two minor daughters from his ex-wife, appellee Virginia Luebke, to him. He argues that the trial judge erred in requiring him to prove that appellee's conduct had adversely affected their children. Because we agree, we reverse and remand for the trial court to make the custody determination under the proper legal standard.

I. Facts

The parties were divorced by virtue of an order entered on November 1, 2005. In their settlement agreement, the parties recognized that each was a fit and proper parent and agreed to share joint custody of their twin daughters, Emily Luebke and Elizabeth Luebke, d.o.b. 3/31/01. The parties agreed that appellee was to have primary physical custody of the girls.

Appellant filed a motion to change custody on July 14, 2006. He alleged the following material changes in circumstances: 1) that appellee associates with a convicted sex offender and allows the children to visit the sex offender's home; 2) that appellee abuses alcohol and drives under the influence of alcohol while the children are in her care; 3) that appellee smokes marijuana while the children are in her care; 4) that appellee does not adequately care for the children's needs; 5) that appellee is not able to meet the children's financial needs; and 6) that, due to appellee's inability to provide for the children, appellant has cared for the children significantly more time than specified in the visitation schedule. Appellee denied these allegations in their entirety but later conceded at the hearing that some of the allegations were true.

Hearings on appellant's motion were held on November 16, 2006, and December 15, 2006. Appellant raised additional allegations during the hearings: that appellee removed Elizabeth's oxygen mask and IV while the child was hospitalized for an asthma attack; that appellee abuses prescription medication; that she continues to smoke against doctor's orders; and that appellee has had two pregnancy tests and an HIV test in the last year.

The trial judge's written order denying appellant's motion was entered on December 15, 2006. The trial judge concluded that a change of custody was not warranted because the girls were well-adjusted, had not been harmed by appellee's conduct, and because it was in their best interest to preserve their relationship with appellee.

The trial judge characterized appellee's conduct in simultaneously obtaining and filling multiple prescriptions of Hydrocodone as "improper." However, he found that, "there was no evidence presented that [appellee] was addicted to the medication or *that she has used the*

medication in such a way to endanger the children.” (Emphasis added.)

With regard to appellee’s admitted conduct of associating with a known sex offender, taking her daughters swimming at the offender’s house when he was not home, and having him over to her home to perform bathroom repairs when she admitted the children may have been present, the trial judge stated that appellee’s “actions were foolish and not necessarily in the best interest of the children.... A parent has to make wise decisions in caring for children and *it is not wise to knowingly place the children in harm’s way, even though there is only a potential for abuse. In this situation, the children were not in danger....*” (Emphasis added.)

Regarding appellee’s conduct in becoming inebriated at a local bar and baring her breasts in front of men, the trial judge noted that, “*The children were not present nor have knowledge of these occurrences....* This behavior is inappropriate, degrading, and could be embarrassing to the children if they knew of their mother’s actions.... The Court will not condone similar poor judgment on behalf of [appellant.]” (Emphasis added.)

As to the testimony that appellee removed Elizabeth’s IV and oxygen without permission when the child was hospitalized during an asthma attack, the trial judge noted that a social worker was called to investigate and that both parents agreed to leave the oxygen on Elizabeth. He further stated that, “[w]hile [appellee] may not have used the best judgment in the situation, *there was no evidence that [she] knowingly or purposely put the child in harm’s way.*”

The trial judge then considered appellee’s numerous financial difficulties and concluded that “even though there are a considerable number of issues raised by [appellant] that are troubling to the Court, [appellant] has failed in his burden of proof to show a material change of circumstances to justify a change of custody.” In so finding, the trial judge stated:

The Court finds that the Defendant has made several foolish decisions since her divorce in November 2005. No one event by itself would give rise to a material change of circumstances, especially taking into consideration the explanations provided by [appellee]. However, looking at all of the events which have occurred in total, the Court cannot help but find that [appellee] could have made better decisions. *Fortunately, the children were never in danger and are doing fine.*

The Court finds it is still in the best interest for the minor children to remain in the primary care of the mother. The mother has a very close relationship with the children.... The children are doing well in school, and by all accounts, are well-adjusted children. [Appellee] does not have the financial resources of [appellant] and she does not always make the best decisions regarding finances but the Court finds that it is much more important that the relationship between the children and [appellee] not be disturbed at this time.

After saying this, the Court also finds that [appellant] is a suitable parent and also has a loving home where the children would be well-cared for and nourished. *If [appellee's] actions continue wherein she makes poor judgments and if those poor judgments place the children in harm's way or adversely affect the children's ability to prosper in school and otherwise, the Court would entertain a motion for change of custody.* This case should serve as a wake-up call to [appellee] that she has to make better decisions regarding her life and those of the minor children.

(Emphasis added.)

II. Discussion

Appellant argues that the trial judge erred in refusing to change custody because he required appellant to prove that the girls had been adversely affected before such a change would be warranted. On appeal from the denial of a motion to change custody, we review the trial judge's findings *de novo* and affirm unless the findings are clearly erroneous or clearly against the preponderance of the evidence. See *Inmon v. Heinley*, 94 Ark. App. 40, 224 S.W.3d 572 (2006). We give due deference to the superior position of the trial judge to view and judge the credibility of the witnesses. *Id.* This deference to the trial judge is even greater in cases involving child custody, as a heavier burden is placed on the trial judge to utilize to

the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id.*

Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the child; all other considerations are secondary. *Id.* A judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the trial judge or were not known by the trial judge at the time the original custody order was entered. *Id.* Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Id.*

We reverse and remand for a new custody hearing based on the holding that the trial judge erred in requiring appellant to demonstrate a material change of circumstances that adversely affected his daughters. While a showing of an adverse impact is relevant in determining whether a material change of circumstances has occurred and in determining the best interests of a child, a trial court cannot require the non-custodial parent to show an adverse impact as part of his burden of proof on either issue. *See, e.g., Calhoun v. Calhoun*, 84 Ark. App. 158, 138 S.W.3d 689 (2003) (reversing and remanding where the circuit court found that a material change of circumstances had occurred but, rather than weighing the best interest of the child, the court required the noncustodial parent to show that the material change in circumstances had an adverse impact on the child). The trial court was obligated, based on the proof presented, to consider the actual and potential harm that appellee's conduct posed to her daughters in determining (1) whether a change of circumstances had

occurred, and (2) whether continuing the custody arrangement was in the best interest of the children in view of the proof.¹

Here, it is clear that in finding no material change of circumstances had occurred, the trial judge repeatedly and erroneously relied on his conclusion that appellant failed to prove that the parties' daughters had suffered an adverse impact from appellee's conduct. Because the trial judge applied the wrong standard of law, his finding that no material change of circumstances occurred is clearly erroneous and must be reversed. On remand, the trial judge should reconsider the custody issue under the proper standard of law.

Reversed and remanded.

PITTMAN, C.J., and MARSHALL, J., agree.

¹Such conduct includes, but is not limited to appellee spending an amount equal to one-half of her monthly financial deficit on Hydrocodone in a single day; having her car repossessed; being required to accept charity in order to have a vehicle or feed her children due to her poor financial decisions; having the electricity shut off when her children were present; having her children kicked out of day care because she failed to pay the bill; and exposing her daughters to potential harm in associating with a known sex offender. We further note that the trial court's finding regarding the hospital incident begs the question: How did appellee fail to use her best judgment *unless* she unhooked Elizabeth's IV and took the child to the playroom without any oxygen?