

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CA07-554

November 14, 2007

RHYS FRANKLIN

APPELLANT

V.

BOBBIE JOHNSON

APPELLEE

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT
[DR-05-241-G]

HONORABLE JIM D. SPEARS,
CIRCUIT JUDGE

AFFIRMED

Rhys Franklin appeals the denial of his petition for change of custody of his son, Braiden Franklin, who was born on August 30, 2004. On appeal, Rhys argues that the trial court erred in finding that there was no material change in circumstances to warrant a change in custody and that it was in Braiden's best interest that custody be changed to him. We affirm the trial court's decision.

In *Alphin v. Alphin*, 90 Ark. App. 71, 74-75, 204 S.W.3d 103, 105-06 (2005) (internal citations omitted), our court set forth the standards for reviewing modifications of custody:

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 primary consideration is the best interest and welfare of the child, and all other considerations are secondary. Custody awards are not made or changed to punish or reward or gratify the desires of either parent.

In child-custody cases, we review the evidence de novo, but we do not reverse the findings of the trial court unless it is shown that they are clearly erroneous. A finding is clearly erroneous, when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children.

In this case, the parties were never married to each other. Therefore, custody of Braiden was placed with his mother, Bobbie Johnson, pursuant to Arkansas Code Annotated section 9-10-113(a) (Supp. 2005). In August 2005, an agreed order of support was entered in which Rhys was named as Braiden's biological father and child support was set, but no visitation was awarded. However, Rhys, Bobbie, and their mothers worked out a schedule that allowed Rhys and Bobbie to have approximately equal time with Braiden. In November 2006, Rhys filed a petition for full custody of Braiden; after she learned of the petition, Bobbie refused to follow the visitation schedule that the parties had created, only allowing Rhys to have Braiden every other weekend.

At the hearing on January 24, 2007, Bobbie, who was twenty-one, testified that she was currently living with Aaron and Chelsea Dickens; that she had been there for a

“couple of months”; that she paid twenty-five dollars per week in rent and one-third of the electric bill. She said that in the last two weeks she had also stayed at her mother’s house and with her fiancé, Jeff Lewis, and she admitted that Braiden was with her sometimes when she stayed at Jeff’s house. Bobbie stated that she did not plan on moving back in with Jeff, with whom she had lived on a previous occasion, until they married because she believed it was immoral. After she moved out of Jeff’s house, she had stayed several places, and she testified that while her current living arrangement with the Dickensens was good, it was not permanent and she was trying to save money to get a house of her own. Bobbie explained that she had worked at Wal-Mart and Chili’s but had been fired from both places and that she was currently working at Abercrombie and Fitch one day a week. She said that she was now available to work more hours since she had been fired from Chili’s and had also been pursuing other employment. She also stated that her mother, father, and sister would be available to keep Braiden anytime she was working.

Bobbie testified that she had purchased a vehicle, had not paid the taxes on it yet, but was going to borrow the money from Jeff. She admitted that she drank alcohol; that she used to go to nightclubs once during the weekend but had stopped doing that a couple of weeks ago because there “was no need for it” and it “really wasn’t that much fun”; that she had a Myspace account; and that while she smoked, she was quitting, and that she never smoked around Braiden. Bobbie testified that she took good care of Braiden and his needs. She stated that she realized that it was inappropriate to be living with someone

to whom she was not married while Braiden was with her; however, she pointed out that Rhys and his former girlfriend and now wife, Jamie, had also lived together before getting married, and that Rhys had never objected to her living with Jeff.

Bobbie said that she tried to work with Rhys on visitation, even though the original order did not specify any visitation, and she denied ever trying to keep Rhys from seeing Braiden. Bobbie noted that Rhys worked evenings for UPS and that someone in Rhys's family would have to take care of Braiden after Rhys left for work. Bobbie asked the trial court to implement the standard order of visitation for Rhys.

Jeff Lewis testified that he and Bobbie had gotten engaged that past weekend and planned on getting married. Although he knew that Bobbie had recently purchased a vehicle, he said that he did not know how she was going to pay the sales tax. Jeff said that Bobbie had been living with him until the end of November, that they were engaged at the time but had broken it off, and that it was a mutual decision for her to leave. Jeff said that he had seen Bobbie smoke cigarettes but not marijuana. He testified that he did not have a problem with Rhys, and he did not recall telling Rhys that Bobbie partied or drank too much. Jeff said that Bobbie was a great mother to Braiden, and that she was always lenient in allowing Rhys to spend a lot of time with Braiden.

Bryan Chandler, a private investigator hired by Rhys to follow Bobbie, testified that he located Bobbie on several occasions at a night club called the Electric Cowboy. He also noted Bobbie's car outside Jeff Lewis's house on a couple of occasions.

Jamie Franklin, Rhys's wife of approximately two months, testified that she had been "keeping track" of how many days Braiden was with her and Rhys, with Bobbie, and with anyone else on a calendar. She said that from July to November 2006, by her calculations, Rhys had Braiden seventy-nine days and Bobbie had Braiden approximately forty-seven days. Jamie said that Bobbie stopped letting Rhys have Braiden as much after she was served with Rhys's motion for full custody. She said that one of the reasons she married Rhys was because he was an excellent father, and that the only problem they had with Bobbie was that the liberal visitation was stopped after Rhys filed for custody.

On cross-examination, Jamie said that she and Rhys had gotten married on November 26, 2006, and that prior to their marriage, she and Rhys were spending the night together while Braiden was present. Jamie admitted that they had family members watch Braiden when they were at work, but that she did not give Bobbie credit for when her mother, Shirley Cogburn, had Braiden because Bobbie "just dropped Braiden off" and did not see him all weekend. She said that it was different for Rhys to allow family members to keep Braiden for a few hours than it was for Bobbie to leave Braiden with her mother. However, Jamie admitted that the reason Braiden stayed with Bobbie's mother on Fridays was because Bobbie was working at Chili's on Friday nights. Jamie disputed that Bobbie had gone out of her way to allow Rhys access to Braiden anytime he wanted to be with him; she said that Bobbie did not change visitation to accommodate Rhys but rather to accommodate herself.

Debra Franklin, Rhys's mother, testified that she, Shirley, Rhys, and Bobbie met together and worked out a schedule to give Braiden more stability and security because he was then staying in one place for several nights in a row instead of being taken from place to place each night. Debra also recounted that Bobbie had asked her for money to buy a car seat for Braiden and for breast augmentation; she gave her money for the car seat but not the cosmetic surgery. She said that she had no reservations about Rhys having full custody of Braiden; that she knew Bobbie loved Braiden; and that it was unfortunate that Rhys and Bobbie were not getting along. She also said that as far as she knew, Bobbie kept Braiden properly clothed and fed.

Rhys Franklin testified that he was asking for full custody of Braiden; that he had been married to Jamie since November 26, 2006, and it was "going great"; and that he currently worked part time for UPS. He explained that he had also previously worked for Wal-Mart but had quit so that he could be available for full-time work with UPS when the opportunity arose. He said that he and Jamie were renting a two-bedroom house from Jamie's grandmother, and that Braiden had his own room. He said that until last month, he had been the person who had taken Braiden to the doctor, but that Bobbie had now been taking him, and Braiden had recently had RSV and two ear infections. Rhys said that the schedule that was worked out between himself, Bobbie, and their mothers gave him more time with Braiden, but that it stopped when Bobbie learned that he was asking for full custody and Bobbie told him that she was only going to allow standard visitation. Rhys told the trial court that his environment was more stable than Bobbie's and that he

had his own house, while Bobbie had lived in numerous places over the past year and a half. Rhys also took issue with the fact that Bobbie and Jeff smoked around Braiden and he was uncomfortable with Braiden being around Jeff's brother, Roy, because Roy drank a lot. Rhys accused Bobbie of using Braiden as a tool, because if he upset her she would threaten to decrease his visitation.

On cross-examination, Rhys said he was not implying that Bobbie should never go out and party, but that there was no reason to do it "all the time," even though he admitted that he had not seen her out partying. Rhys admitted that he occasionally drank and that he smoked one or two cigarettes a day, but he denied smoking around Braiden. Rhys admitted that Bobbie was a good mother; that she kept Braiden properly clothed and fed; that she was attentive to his needs; and that she watched out for him. He said that he had no problem with Bobbie's choice of babysitters, although he had a problem with Braiden staying with Bobbie's mother because he had to sleep on a mattress on the floor. However, he admitted that to his knowledge, there were no instances where Braiden had been hurt or not properly supervised by Bobbie's mother and that she was a good person.

Shirley Cogburn, Bobbie's mother, testified that she and Bobbie had had no problems with the schedule that had originally been worked out for Braiden. She said that Braiden had been at her house a lot because he had been sick and she had been babysitting him, and that Bobbie had been coming to her house after work and either picking him up or staying there with him. Shirley said that since her older daughter had come to live with her, Braiden had been sleeping on a mattress in the living room but that

her older daughter was moving out the next week. She said that Bobbie and Braiden loved each other and that Bobbie was a good mother and took very good care of Braiden.

At the close of the hearing, the trial judge told Bobbie that she stood convicted of being twenty-one years old. He told Bobbie that she had not had a chance to be a kid herself, and that all of the things that she had done were typical of a twenty-one-year-old person. However, he also told her that she had to grow up because she had responsibilities that did not mesh with what a normal twenty-one-year-old person would have because she had a child. The trial judge noted that Bobbie had said that she would not be doing a lot of that stuff anymore, and he told her that she did not need to be doing those things because her primary responsibility was to her child. He said that nothing he had heard made Bobbie a bad person, just a typical person. The trial judge told her that she could not take care of Braiden when she was constantly being hired and then being fired. He noted that no one, not even Rhys or his mother, said Bobbie was a bad parent, but that the criticism was that she partied too much and bounced around from place to place, which needed to stop. The trial judge refused to change custody, but he said that he was not altogether thrilled, and that he wanted Bobbie and Rhys to work together to come to agreements because they had cooperated well in the past. The trial judge told Rhys that he should not have been surprised that Bobbie's attitude changed when he filed for full custody because that was threatening to her. The trial judge then gave Rhys standard visitation, with the understanding that he would approve something different if they both agreed to it.

Rhys now appeals the denial of his petition for change of custody, arguing that the trial court erred in finding that there was no change in circumstances warranting a change in custody, and that it was in Braiden's best interest to have custody changed to him. In support of his change-of-circumstances argument, Rhys argues that Bobbie admitted that she had cohabited with Jeff Lewis, and that unmarried cohabitation "cannot be abided," citing *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001). In that case, the parties had a non-cohabitation clause in a temporary-custody order, which the mother ignored when she purchased a house and began living with her same-sex partner. That is vastly different from this case, where there was no non-cohabitation order and where both parties were living with their significant others while Braiden was present. Rhys points out in his reply brief that he married his girlfriend while Bobbie remained unmarried at the time of the hearing; however, Bobbie testified at the hearing that she was not going to live with Jeff again until after they were married. We find no distinction between the two situations, and we hold that it is not a material change in circumstances.

Rhys also argues that there was a material change in circumstances when Bobbie cut off Rhys's liberal visitation after he filed for full custody. This argument overlooks the fact that Bobbie had custody of Braiden and there was no visitation order in place; therefore, Bobbie was completely within her rights to limit Rhys's visitation. Bobbie had been very liberal and had worked well with Rhys to give him a lot of time with Braiden until Rhys filed for full custody. Rhys tries to make this limitation be an alienation, citing *Sharp v. Keeler*, ___ Ark. App. ___, ___ S.W.3d ___ (May 9, 2007). This case is

different from *Sharp* in that the mother in that case refused to follow the visitation schedule that had been set forth for the father by the court and went to great lengths to frustrate the father's visitation. Furthermore, this court affirmed the trial court's decision to change custody to the father in *Sharp*, as that decision was not clearly erroneous. Rhys is asking this court to find that the decision to deny his request for change of custody was clearly erroneous, which we will not do. Rhys also argues that there was a material change in circumstances from July 2006 to November 2006 because he had physical custody of Braiden more than Bobbie. He overlooks the fact that Bobbie voluntarily agreed to this schedule to allow Rhys to have more time with Braiden and only restricted this visitation when Rhys sought full custody. Until this hearing, there was no visitation order in place, and Bobbie should be commended, not condemned, for providing Rhys with extremely liberal visitation with Braiden.

Rhys also points out that Bobbie had held several different jobs and lived at several different places in the months before the hearing, all of which was true and was taken into account by the trial judge but does not amount to a change of circumstances. This court gives special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest, as there are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children. *See Alphin, supra*. There was no testimony that Bobbie was a bad mother; in fact, everyone, including Rhys and his

mother, testified that Bobbie was a good mother who took care of all of Braiden's needs. We simply cannot say that the trial court's decision was clearly erroneous.

Rhys also argues that it is in Braiden's best interest for custody to be changed to him. We disagree. All of Rhys's arguments under this point are repetitive of the arguments he made under his first point. We cannot say that the trial court's decision to have custody remain with Bobbie was clearly erroneous.

Affirmed.

HART and MILLER, JJ., agree.