NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA08-379

BOBBY SHEFFIELD
APPELLANT

V.

KELLY SHEFFIELD
APPELLEE

Opinion Delivered December 17, 2008

APPEAL FROM THE LOGAN COUNTY CIRCUIT COURT, [NO. E-2000-88 (1)]

HONORABLE DAVID H. MCCORMICK, JUDGE

REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

In this one-brief case, Bobby Sheffield appeals from an order of the Logan County Circuit Court that eliminated his overnight Tuesday visitation with his nine-year-old son, A.S. On appeal, he argues that the trial court erred in modifying the visitation, which had been set by agreement of the parties, because appellee Kelly Sheffield failed to prove a material change of circumstances. We reverse and remand.

In the parties' original divorce decree, entered on March 15, 2001, when A.S. was two years old, they agreed that Bobby would have the previously mentioned Tuesday-night visitation as well as Thursday-evening visitation between the hours of 4:00 to 7:30 p.m.. Bobby diligently exercised this visitation for more than six years. However, when some friction developed between the parties, apparently related to the child's sports activities, Kelly petitioned to eliminate the weekday visitation. She alleged that it was no longer in A.S.'s best interest because it interfered with the child's "schedule, education, [and] routine."

At the hearing on her petition, Kelly testified, in pertinent part, that Bobby would return A.S. from Tuesday-night visitation between 5:30 and 6:00 a.m. and frequently the child would not have his homework completed. Although it was not disputed that the child was an A student, the trial court announced from the bench that "the fact the child is now school age, that's a little different than it was when we started," and the early-morning return times were "a little early." On this basis, the trial judge eliminated the overnight portion of the Tuesday visitation.

The trial court maintains continuing jurisdiction over visitation and may modify or vacate such orders at any time on a change of circumstances or upon knowledge of facts not known at the time of the initial order. *Williams v. Ramsey*, 101 Ark. App. 61, --- S.W.3d ---- (2007). While visitation is always modifiable, our courts require a more rigid standard for modification than for initial determinations in order to promote stability and continuity for the children, and to discourage repeated litigation of the same issues. *Id.* The party seeking a change in visitation has the burden below to show a material change in circumstances warranting the change in visitation. *Id.* When this court reviews modifications to visitation, we consider the evidence de novo, but will not reverse the trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Id.* Reversal is warranted where a trial court modifies visitation where no material change in circumstances warrants such a change. *Id.*

Bobby argues on appeal that the trial court erred in changing visitation because there was not a material change in circumstances. He concedes that A.S. was not in school at the time that the original visitation order was entered, but asserts that his eventual enrollment in school was "contemplated by the parties." Further, he contends that the schedule that the trial court found unacceptable had been the same one that A.S. had been on since he was in kindergarten.

Accordingly, these minor changes can not be found to be "material." We agree.

This court has previously rejected the conclusion that a child's aging is a material change of circumstances. *Harrington v. Harrington*, 55 Ark. App. 22, 928 S.W.2d 806 (1996). We stated,

> To reopen the issue of custody solely on the basis that the children are now fourteen months older, as in this case, could permit annual custody battles. This would eventually reward the parent with the greater stamina rather than accommodate the best interests of the children involved.

55 Ark. App. at 25, 928 S.W.2d at 25. Even though the time lapse here was greater than that in *Harrington*, standing alone, the mere passage of time has never been a sufficient basis for finding a material change of circumstances. *See Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). Eventual school attendance by a pre-schooler, and advancement in grade are the natural consequences of the child getting older. Accordingly, we hold that attendance in school, standing alone, cannot constitute a material change in circumstances.

Likewise, we do not accept that the supposed disruption in A.S.'s routine is a material change of circumstances. As Bobby notes, that routine was established over the six years that the visitation agreement was in place, including four years in which the child was in school. Accordingly, eliminating Tuesday overnight visitation would disrupt the child's "routine," not preserve it. Furthermore, it was undisputed that A.S. was thriving in school, so there is no evidence that the visitation schedule was adversely affecting him. Finally, we are mindful that Kelly testified that A.S. was not completing his homework on the Tuesday nights that he had visitation with his father. However, the trial court made no finding concerning that allegation, and it did not list acknowledge this allegation as the basis for modifying visitation. We therefore reverse and remand

this case to the trial court to re-institute the previous visitation schedule and for other such necessary orders consistent with this opinion.

Reversed and remanded.

ROBBINS and BAKER, JJ., agree.