NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-394

	Opinion Delivered OCTOBER 29, 2008
LARANDA NEELY DUFF BULLOCK APPELLANT	APPEAL FROM THE OUACHITA COUNTY CIRCUIT COURT, [NO. E-98-308-04]
V.	HONORABLE CAROL CRAFTON ANTHONY, JUDGE
JOSHUA STEED APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Laranda (Nicole) Neely Duff Bullock appeals the November 15, 2007 order of the Ouachita County Circuit Court denying her petition for change of custody. On appeal, appellant asserts that the trial court's finding that a material change of circumstances had not occurred was clearly erroneous. We affirm the trial court's order.

Statement of Facts

The parties were never married, but had a daughter, J.S., born August 19, 1997. At appellee Joshua Steed's prompting, an agreed order of paternity was filed September 23, 1998, which required him to pay $100 per month in child support and set forth the visitation to which he was entitled. By agreed order filed February 5, 1999, the child's last name was changed to Neely-Steed and visitation was specified more fully. In August 1999, an agreed order was filed that increased appellee's child support obligation to $112 biweekly.

Subsequently, appellee filed a petition to change custody, which resulted in an order filed May 28, 2002. In that order, the trial court found a material change of circumstances warranting a change of custody to appellee. In the letter opinion attached to the order, the trial court made the following findings of fact:

> In April 1998, Nicole married Randy Duff and moved out of her parents' home. [J.S.] went with her. This was the first of many moves for Ms. Neely and [J.S.]. They resided together in an apartment in East Camden for approximately three months. They next moved to a home in Locust Bayou where they stayed for two months. Nicole and Randy separated in August 1998. (It is unclear whether the couple ever divorced or are still just separated). Sometime in early 1999, Ms. Neely moved to a home on Gallivant Street. Amber Nalls and Adam Garcia were her roommates for some period of time. In 2000, Ms. Neely moved to 223 Ingram Street where she and [J.S.] resided with Amber Nalls, Brandy Nalls and Brandy's son.
> Later in 2000, Ms. Neely moved into a trailer that was adjacent to her parents' home . . . She stayed there until moving to Rogers, Arkansas in February 2001.
> . . .
> [J.S.] went with Ms. Neely for the first two weeks of her stay in Rogers. She stayed with her grandparents for the remainder of the seven months.
> . . .
> Ms. Neely remained in Rogers until November 2001 when she returned to live with her parents. At the time she returned home, she was seven months pregnant. Her second child was born on January 16, 2002, and lives with Ms. Neely, her parents, and [J.S.]. She has no plans to marry the father of the second child nor does she have any contact with him.
> . . .
> Since the birth of [J.S.] some four and one-half years ago, Ms. Neely has held various jobs. She currently works at a restaurant/bar three nights per week but testified she plans to enroll in nursing school at South Arkansas University in August.

The trial court agreed with appellee's assertions that a change in circumstances had occurred. Those changes included appellant leaving her child with her parents while she moved to Rogers, Arkansas, appellant's violation of the court's order with respect to overnight guests and living arrangements, and appellant's inability to provide a stable home.

On May 3, 2006, appellant filed a petition for change of custody. She alleged that there were substantially changed circumstances and it was in the best interest of the child to place custody with her. Appellee answered and counterclaimed for child support and for half of all medical, dental, orthodontic, and optical expenses. A hearing was held on July 2, 2007, and by letter opinion of August 17, 2007, the trial court denied the petition to change custody. The trial court's findings included the following:

> Since 2002, Nicole has married Jimmy Bullock and resides in Houston, Texas with Jimmy, their child Harley, and Carolina, her child from a previous relationship. Ms. Bullock is now a stay-at-home mom who is actively involved in her children's lives and activities. Mr. Bullock, who works for a drilling company, recently received a promotion and now earns between $140,000 and $150,000 per year. Since her move to Houston, she has made the trip back to Camden, Arkansas, every other weekend to exercise her visitation with J.S. To say that Ms. Bullock has changed her life and the focus of her life in the last five years would be an extreme understatement. The Court cannot commend her enough for these changes.
>
> Ms. Bullock contends the change in circumstances is the lack of time Mr. Steed has for J.S. due to his new family, his work schedule and his reluctance to allow her to participate in outside activities. She asserts there are more cultural and extra-curricular opportunities and a better education system available in Houston for J.S. In addition, J.S. tearfully expressed her desire to live with her mother in Houston.
>
> However, a change in circumstances is not measured by the changes in the non-custodial parent's life but by those in the custodian's life. Mr. Steed has completed his barbershop education and now regularly works for his father at the DeLuxe Barbershop. He has married and has a child by his wife. They have purchased a home in Harmony Grove. Three children including a stepchild also reside in the home with them. The family is very active in church activities.
>
> At this time, the Court does not find there has been such a change in circumstances that warrant a change of custody. However, the Court is mindful of the desires of the child and is of the opinion that when she is of an age when her request has more weight, custody could very well be changed.

Further, the trial court stated its concern over the evidence that J.S. only participated in activities convenient for her father, that J.S. gave her mother the book entitled "Alcohol: The Beloved Enemy" for Christmas, which the trial court interpreted as an effort by appellee to belittle and demean appellant in front of the child, and that someone had voiced an opinion to J.S. that her mother was "going to hell." The trial court then admonished the parties about trying to adversely affect the child's relationship with the other parent, awarded child support to appellee, and ordered the parties to share the travel burden for visitation. Appellant filed a timely notice of appeal on December 11, 2007, and this appeal followed.

Standard of Review

Our court has set forth the well-settled standard of review applied in custody cases as follows:

> In reviewing [equity] cases, we consider the evidence de novo, but will not reverse a [trial court's] findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). We give due deference to the superior position of the [trial court] to view and judge the credibility of the witnesses. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). This deference to the [trial court] is even greater in cases involving child custody, as a heavier burden is placed on the [trial court] to utilize to the fullest extent [its] powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Anderson v. Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). Where the [trial court] fails to make findings of fact about a change in circumstances, this court, under its de novo review, may nonetheless conclude that there was sufficient evidence from which the [trial court] could have found a change in circumstances. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988). Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). 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 court] or were

> not known by the [trial court] at the time the original custody order was entered. *Jones*, 326 Ark. 481, 931 S.W.2d 767. Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Id.*

Harrison v. Harrison, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 17, 2008) (citing *Hamilton v. Barrett*, 337 Ark. 460, 465-66, 989 S.W.2d 520, 523 (1999)). A trial court's conclusions of law are given no deference on appeal and are reviewed de novo. *Hill v. Kelly*, 368 Ark. 200, 243 S.W.3d 886 (2006).

Material Change of Circumstances

Appellant argues that the trial court's letter opinion reflects that she understood the law to be that "a change in circumstances is not measured by the changes in the non-custodial parent's life but by those in the custodian's life." Based upon this understanding of the law, the trial court found that appellant had not met her burden of proof. Appellant claims that the trial court erred as a matter of law. Alternatively, appellant contends that the conclusions reached by the trial court are clearly erroneous.

In order to change custody, the trial court must first determine that a material change in circumstances has occurred since the last custody order. If so, then the trial court must determine who should have custody with the sole consideration being the best interest of the children. *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004). Appellant maintains that, because the trial court determined that no change in circumstances occurred, she never reached the question of the best interest of the child.

Appellant argues that the totality of the circumstances — including both parties — should be considered. With this statement of the law we agree. The trial court admitted that

appellant had changed her life in an extreme way. Appellant maintains that the trial court heard evidence that she is no longer a waitress, but a stay-at-home mother. She is happily married to a man who works at a stable job earning about $140,000 per year. She is raising two other children in her household, and they live in a suburb of Houston in a new, spacious home on a quiet cul-de-sac. She claims there will be no more moving from residence to residence as there had been in 2002. She attends church whenever she is in Houston, which is every other weekend because of the visitation schedule. She attends field trips with J.S., and her mother babysits J.S. after school until five o'clock. Therefore, appellant argues there has clearly been a material change of circumstances in her life. However, we do not find erroneous the trial court's conclusion that those changed circumstances in appellant's life do not amount to a material change in circumstances in the child's life to warrant a change in custody, even when coupled with appellant's allegations regarding changes in appellee's life.

Appellant maintains that the material changes in circumstances in J.S.'s life include that she has aged from four to almost ten since the last order was filed. She has expressed to the trial court her desire to live with her mother in Houston. Appellant claims that the child's desire is based in part upon a belief instilled in her by her father that her mother is not a Christian and will not go to heaven when she dies, and in part because she wants to participate in more activities other than those provided by her school and her church.

However, in her brief, appellant admits the following about appellee:

> Mr. Steed, the father, has admittedly, not suffered any catastrophic problems in his life. No drugs or alcohol abuse. (In fact, he labels alcohol as poison and allowed [J.S.] to give Ms. Bullock his personal copy of a book entitled "Alcohol, the Beloved Enemy"). No cohabitation with someone to whom he was not married. No loss of job as he

continues to work as a barber with his father. No marital problems with his present wife. He has a good home for [J.S.] and his three other children to live in.

Nevertheless, appellant argues that there are aspects of appellee's life that should be considered as material changes in circumstances. She claims that appellee has no life other than his work, his church, and J.S.'s school, where he sometimes works as a substitute teacher. Therefore, appellant claims J.S. has no life other than church and school.

Appellant argues that appellee balked at allowing J.S. to have any activities prior to noon on Saturday because it interferes with his work schedule. She claims that he also balked at allowing J.S. to attend gymnastics on Monday afternoon, arguing that appellee would only allow her to go if someone else could take her. She contends that the children in appellee's house fix their own breakfasts and frequently fix their own dinner at night. She asserts that the only sport J.S. has ever played was basketball, which was a church activity. The only non-church activity J.S. participated in was two or three mini-cheerleader camps. Appellant argues that this, taken together with the trial court's concerns as listed in the letter opinion, amounts to a material change in circumstances. The trial court disagreed, and we cannot say that this conclusion is clearly erroneous.

Appellant cites several cases in support of her argument. She asserts that alienation of a child from a parent has long been a factor in determining not only the best interest of the child but also whether a change of circumstances has occurred. *Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007). She maintains that appellee admitted providing the book on alcohol to J.S. to give to her, and that J.S. told people one of the reasons she wanted to move to Houston was because her mother was not a Christian and she was afraid her mother would

not go to heaven. Appellant's mother testified that J.S. told her that her father said her mother would not go to heaven unless she changes her ways. Appellant argues that appellee conveyed these thoughts to J.S. as an attempt to alienate his daughter from her mother. Based on this, appellant believes that the trial court should have found a material change of circumstances.

Appellant next contends that both parties have remarried,[1] and argues that this may be considered a material change of circumstances when coupled with other factors. *See Hamilton v. Barrett*, *supra*; *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996); *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). In *Hamilton v. Barrett*, our supreme court held:

> [Appellant] asserts that *Jones*, [*supra*,] stands for the proposition that the noncustodial parent's remarriage cannot be properly considered by the chancellor in determining whether a modification in custody is warranted. This interpretation is too narrow. In *Jones*, this court held that based on the facts presented, Dr. Jones's remarriage did not constitute a material change in circumstances. In other words, the holding in *Jones* merely underscores the rule that changes in circumstances of the noncustodial parent, including a claim of improved life because of remarriage, were not alone sufficient to modify an order of custody. Indeed, during oral argument before this court, Dr. Jones admitted that at the time of the divorce decree, it was within his reasonable contemplation to remarry.

Hamilton, 337 Ark. at 467, 989 S.W.2d at 523-24.

Appellant explains that this court held in *Hollinger*, *supra*, that a material change in circumstances occurred when the remarriage of the father and the move of the mother combined with (1) the substantial passage of time between the original decree and the modification, (2) the decidedly strained relationship existing between the daughters, especially

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[1]Joshua Steed testified that he married Melinda Steed in December 2001.

the eldest, and the mother, and (3) the clear preference of the girls to live with their father in their hometown. *Hollinger, supra*. Appellant argues that, with the exception of the "strained relationships," all of those same factors are present in this case. She also contends that *Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003), stands for the proposition that material changes in the life of the non-custodial parent do count. In *Mason*, this court held that the radical improvement in the mother's life, coupled with the deteriorated circumstances of the father's life justified the change in custody to the mother. *Id*.

However, the cases cited by appellant only give credence to the trial court's findings that no material change of circumstances have occurred. At the time of the custody hearing, J.S. had just completed the third grade, she had played Upward Bound basketball, was a member of Awanas at church, and was a member of the church choir. J.S. turned down appellee's offer to enroll her in dance and softball. She was an honor student and was the recipient of a creative writing award at school. Appellee went to all of the parent-teacher conferences for J.S. and helped work out a system for J.S. to complete her homework by keeping up with her assignments in a notebook. Her teacher testified she was happy, social, and had friends. Her teacher also stated that appellant never attended a parent-teacher conference nor spoke to her about J.S.

The present case is different from *Hollinger*, *supra*, in that appellee has not moved from the area and is living in the same community in which he was living at the time he was granted custody. He is married to the same person he was married to when he received custody in 2002. There is no strained relationship between him and J.S. Appellee testified

that he and J.S. go to football games, golf, hunt, play putt-putt golf, ride go carts, and go to the lake. The entire family eats out together once a week, and goes to church together on a consistent basis.

The instant case is distinguishable from *Mason*, *supra*, in that in the underlying custody order in *Mason*, the trial judge had reservations about the dismal existence and other circumstances in the father's home, but granted him custody because the mother was in no position to have custody at the time. When the issue was presented to the same trial judge the second time, the trial judge found radical improvement in the mother's life, combined with the deterioration of the already dismal circumstances in which the father lived justified the change of custody. In the instant case, the same trial judge presided over the last two custody hearings. However, in contrast to *Mason*, appellee's situation is not dismal, but stable.

The alienation issue addressed by this court in *Sharp v. Keeler*, *supra*, was described as follows:

> The record of continued alienation of Keeler by Sharp is a material change of circumstances. Sharp failed to keep Keeler updated regarding Corbin's medical conditions. In addition to telephoning Keeler, Sharp had other ways of contacting him about Corbin's biopsy and surgery. For example, Sharp knew how to text message, as adduced by the testimony, yet she did not send the important information; rather she just kept leaving cryptic messages. She refused to allow the nurses at Arkansas Children's Hospital to divulge to Keeler more information than she decreed necessary, even after Keeler had to beg Sharp for the password to be able to be told any information about his son. Sharp changed Corbin's chemotherapy appointments and refused to let Keeler be present during the treatments. She denied visitation at times, although she said that she allowed some of it to be made up, and she would not have Corbin ready when visitation was supposed to begin. Sharp would not allow Keeler's wife or mother to pick Corbin up, although they were approved persons. On the whole, the evidence demonstrates a material change of circumstances since the entry of the initial custody order; the trial court found that it was in Corbin's best interest

> to have custody changed to Keeler; and we cannot say that this decision was clearly erroneous.

Id. at 55-56, 256 S.W.3d at 537. Appellee maintains that the trial court's admonishment in its custody order regarding J.S.'s concern for her mother and whether she would go to heaven did not amount to a finding of alienation by appellee as described above. He maintains that he has worked with appellant to give additional time with the child as reflected in his allowing the planned trip to Disney World and by allowing the maternal grandparents weekly visits, as well as special activities.

Giving due deference to the superior position of the trial court to view and judge the credibility of the witnesses, and recognizing that this deference is even greater in cases involving child custody, as a heavier burden is placed on the trial court to utilize to the fullest extent its powers of perception in evaluating the witnesses, their testimony, and the best interest of the children, we cannot say that the trial court's findings were clearly erroneous. *See Harrison v. Harrison*, *supra*.

Affirmed.

HART and HEFFLEY, JJ., agree.