Cite as 2012 Ark. App. 528

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-1231

SARAH JEAN COLE (MADDEN) APPELLANT V. DAVID COLE APPELLEE	**Opinion Delivered** September 26, 2012 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. DR 2002-487] HONORABLE JIM D. SPEARS, JUDGE AFFIRMED

RITA W. GRUBER, Judge

This case involves a custody dispute between appellant Sarah Jean Cole and her ex-husband, appellee David Cole, over their son J.C. The parties were divorced by a decree entered on September 30, 2002, which awarded sole custody of J.C. to appellant and standard visitation to appellee. Appellant brings this appeal from the circuit court's order of August 19, 2011, which modified the initial custody order and awarded sole custody of J.C. to appellee and standard visitation to appellant. She argues there was no material change of circumstances to support the court's decision modifying custody and that, even if there had been a material change of circumstances, modification was not in the best interest of her son. We hold that the court did not clearly err and affirm its decision.

To fully explain the issues in this case, some background facts are necessary. At the time this case began, appellant had sole custody of her three children, each of whom had a

different father. All three fathers filed petitions for modification of custody, and the three cases were consolidated into one hearing, held in April and July 2011.[1]

Appellant was married to Gabriel Edmonds—the father of daughter M.E.E., who was eleven at the time of the hearing—from December 1997 until June 2000. She was then married to appellee—the father of son J.C., who was nine at the time of the hearing—from August 2000 until September 2002. Finally, appellant was married to Aaron Madden—the father of daughter B.M., who was six at the time of the hearing—from July 2003 until May 2006. At the time of the hearing, appellant was, and had been for three years, in a relationship with Jennifer Sarrubbo, whom she met online and who moved from New York to Arkansas in June 2009 to be with appellant.[2]

In their petitions, the fathers contended that appellant had abandoned her children with her parents and was no longer living with or providing primary care for them. The evidence from interrogatories and the hearing showed that since her divorce in 2006 from Mr. Madden, appellant had resided at 2209 Quarry Drive, Van Buren (April 2006–August 2008); with her parents in Van Buren (August 2008–October 2008); with Ms. Sarrubbo in New York (October 2008–April 2009); and with her parents in Van Buren (April 2009–May 2009). From June 2009 until the fathers filed petitions in April 2010, the evidence was

[1]Emergency orders entered in April 2010 placed temporary custody (until the 2011 hearings) of two of appellant's children, B.M. and J.C., with their respective fathers, Aaron Madden and appellee.

[2]Ms. Sarrubbo testified that she and appellant were married in a ceremony on September 13, 2010, in Iowa.

conflicting regarding where appellant lived. She claimed that she lived with the children and her parents in her parents' home in Van Buren. Evidence was introduced at trial that, during that time, appellant signed two apartment leases in Bentonville, established utilities for the two Bentonville apartments in her name, stated on her MySpace account that she lived in Bentonville during that time, listed on her professional website for Sarah Madden Photography that she lived in Bentonville, and signed a gay-marriage petition stating that she lived in Bentonville. In her answers to interrogatories, she stated that from December 2009 through April 2010, she lived in Bentonville and at her parents' home. She failed to list an address in her interrogatories for the period between June 2009 and November 2009. At trial she denied having ever lived in Bentonville; claimed that she signed the leases merely to help her busy partner, Ms. Sarrubbo, move from New York to Northwest Arkansas; and said that she only visited Ms. Sarrubbo in Bentonville, primarily on the weekends.

After a lengthy hearing at which appellant, the three fathers, all three children, Ms. Sarrubbo, J.C.'s teacher, B.M's teacher, Mr. Madden's wife, and appellant's parents testified, the circuit court entered orders finding that there had been a material change in circumstances and that it was in the best interest of B.M. and J.C. to award permanent, sole custody to their respective fathers.[3] While not specifically addressed in the order in this case, it appears that custody of M.E.E. remained with appellant. The court awarded standard visitation with J.C. to appellant and ordered the visitation, including holiday and summer

[3]Appellant also filed an appeal from the order awarding custody of B.M. to Mr. Madden. *See Madden v. Madden*, 2012 Ark. App. ___.

visitation, to coincide with her visitation with B.M. and her custody of M.E.E. so that the three children would see each other regularly.

The court found that the following circumstances were sufficient to establish a material change in circumstances:

> a. The Plaintiff [appellant] has engaged in numerous short-lived relationships and marriages;
> b. The Plaintiff has failed to maintain a residence of her own;
> c. The Plaintiff has had her children reside in the care of her parents;
> d. The Plaintiff moved to New York in 2008 without the children and lived there for a period of six (6) months;
> e. The Plaintiff failed to notify the Defendant [appellee] of her move to New York;
> f. The Plaintiff is engaged in a homosexual relationship of which the children are not fully aware and do not understand; and
> g. The Plaintiff rented an apartment in Bentonville, Arkansas and established utility served [sic] at the residence in or about April 2009 while the children remained in the care of her parents in Van Buren, Arkansas.

In support of its best interest finding, the court found that appellant's multiple short-lived relationships, failure to maintain a residence, inconsistent and short-lived employment, and entry into a same-sex marriage not recognized in the State of Arkansas demonstrated an absence of stability. The court also found that appellee was stable and a suitable role model for his son; that J.C. had been in the temporary custody of appellee for over a year; and that any change in that custody would be disruptive. Finally, the court stated that appellant's instability and appellee's ability to be a male role model outweighed J.C.'s expressed desire to live with his sisters. Appellant brought this appeal from the court's order.

We conduct a de novo review of cases involving child custody and related matters, but we will not reverse the trial court's findings unless they are clearly erroneous. *Collier v. Collier*, 2012 Ark. App. 146, at 5. A finding is clearly erroneous when, although there is

evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* The question of whether the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, and we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Id.*

Appellant argues first that there was no material change in circumstances because her behavior had not changed since the parties' divorce, appellee was aware of her behavior at the time of the divorce and agreed to give her custody, and he took no action for eight years to modify their arrangement. She argues that her pattern of behavior—that is, having visitation exchanges occur at her parents' house and having a history of short relationships—had not changed. She also contends that the court's seven findings regarding a change in circumstances are clearly erroneous and not supported by the proof. She argues that she had maintained a residence of her own, that there were periods during which she and her children lived with her parents, but that the only time she had not been the primary caretaker for her children was during the six-month period that she was in New York. She and her parents testified that, with the exception of her six months in New York, appellant was the children's primary caretaker and their grandparents merely babysat while she was at work. She points to this testimony to support her argument that the court's finding that her parents took care of her children is clearly erroneous. She argues that the fact that she lived in New York for six months and failed to notify appellee is moot because she had been back for a year when appellee filed the petition for modification and he never once asked where she

was during this period. She testified that she did not live in Bentonville and argues here that appellee failed to prove that she did live there. Finally, she claims that appellee failed to show how the fact that she is in a homosexual relationship constituted a material change in circumstances.

We disagree that appellee "assumed the risk" of appellant's post-divorce behavior because she was already exchanging visitation of M.E.E. with Mr. Edmonds at her parents' home when she was married to appellee. Evidence was introduced that supports the court's findings. After the parties divorced, appellant entered into a three-year marriage with Mr. Madden. She then lived in a variety of places during the next five years. She admits that she left her children in October 2008 and moved to New York to live with Ms. Sarrubbo, whom she met online, and did not return until April 2009. She also admits that she did not notify appellee that she had moved to New York. She denies that she lived in Bentonville, but evidence introduced at trial indicated that she signed leases on two apartments in Bentonville, obtained utility services in her name for the residences in Bentonville, had jobs in Fayetteville and Bentonville in June 2009 and in September and October 2009, had her paychecks sent to the apartment in Bentonville, signed a petition listing her address as Bentonville, and set up a website for her photography business listing her residence as Bentonville. The court was not required to believe either her or her mother's testimony. Based on our review of the record, and giving due deference to the superior position of the court to determine credibility, we hold that the court's finding of a material change in circumstances is not clearly erroneous.

For her second point on appeal, she contends that, even if a material change in circumstances existed, appellee's custody of J.C. was not in J.C.'s best interest. She points to her own testimony and that of Ms. Sarrubbo and her mother that J.C. was not the same happy child after he moved in with appellee that he had been before and to J.C.'s testimony that he wanted to live with his mom so that he could be with his sisters. She fails to mention, however, that appellee testified that he and J.C. had a good relationship, good communication, and did a lot of activities together. Appellee testified that his work schedule allowed him to pick J.C. up from school each day. J.C.'s teacher testified that J.C. was one of her smartest students, that he had excellent behavior, and that she had no concerns with the parenting he was receiving at home. J.C. was nine at the time of the hearing. He testified that, although he missed his sisters, everything was fine at his dad's house. It appears the court took J.C.'s desire into consideration when it fashioned appellant's visitation so that she would have all three children at the same time. The court heard testimony from numerous witnesses. Issues of credibility and weight given to witnesses' testimony lie with the circuit court, not this court. *Taylor v. Taylor*, 345 Ark. 300, 304, 47 S.W.3d 222, 224 (2001). We hold that the court did not clearly err in finding that it was in the best interest of J.C. that primary custody be awarded to appellee.

Affirmed.

HART and WYNNE, JJ., agree.

Rex W. Chronister and *Megen C. Prewitt*, for appellant.

Brent A. Hall, for appellee.