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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-170

ASHLEY BROWNING APPELLANT V. ROBERT WILLIAM JONES APPELLEE	**Opinion Delivered** September 19, 2012 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SEVENTEENTH DIVISION [NO. 60DR 2010-4329] HONORABLE MACKIE M. PIERCE, JUDGE AFFIRMED

RITA W. GRUBER, Judge

This appeal arises from the Pulaski County Circuit Court's denial of two pleadings filed by Ashley Browning against her ex-husband Robert Jones: (1) a petition for contempt for allegedly violating several provisions of the parties' custody, support, and property-settlement agreement, which was incorporated into the parties' divorce decree; and (2) a motion to restrict Mr. Jones's visitation because of his alleged violations. Ms. Browning appeals, and we affirm the court's order.

The parties were divorced after two years of marriage by a decree entered on February 15, 2011. They have one child, who was born November 10, 2009. Their divorce decree incorporates a custody, support, and property-settlement agreement setting forth, among other things, the parties' agreement to share joint legal custody of their daughter, with Ms. Browning having primary physical custody and control. Mr. Jones's visitation consisted of

alternating weekends from Thursday at 6:00 p.m. until Monday at 6:00 p.m. The decree also sets forth a holiday and summer visitation schedule and details various conditions that apply to the parties regarding their daughter. Ms. Browning is a registered nurse anesthetist at Little Rock Anesthesia and lives in North Little Rock. Mr. Jones is a farmer and lives in Crawfordsville. The parties conducted exchanges of the child for visitation at McDonald's in Brinkley.

On May 17, 2011, Ms. Browning filed a motion to show cause, alleging that Mr. Jones had violated numerous provisions of the parties' incorporated custody, support, and property-settlement agreement and asked the court to hold him in contempt and punish him by confinement in jail, payment of a fine, and payment of her attorney's fee. She alleged the following violations of the agreement: refusal to provide her with proof of dental insurance for their child; refusal to inform her of his current residential address and contact information while the child is in his care; refusal to allow the child reasonable telephone contact during visitation; use of profanity and indignities against her in the presence of the child; refusal to apprise her whether he takes the child out of state during visitation; failure to keep the child on the same schedule as the child is on with Ms. Browning; and defiance and refusal to cooperate with her to resolve visitation conflicts.

Mr. Jones responded, denying the allegations and including a counterclaim. He contended that Ms. Browning had violated a number of the agreement's provisions, including denying scheduled visitation; failing to inform him of the child's doctor visits; failing to return certain items of his personal property, including a welding machine; and interfering with the

peaceful enjoyment of his child during visitation by incessant e-mails, texts, and phone calls and hiring a private investigator to follow him during visitation and other times.

Several months later, on August 16, 2011, Ms. Browning filed a motion to modify the decree and restrict Mr. Jones's visitation. She rephrased two of the primary issues in her motion to show cause as (1) whether Mr. Jones willfully disobeyed the court's decree by "cussing and yelling indignities directed toward [her] in the minor child's presence during visitation exchanges"; and (2) whether Mr. Jones willfully disobeyed the court's decree by "not apprising [her] of a true and valid address while the minor child was in his care." She then described a recent visitation exchange during which she alleged that Mr. Jones "peeled out driving his truck" in the McDonald's parking lot and "accelerated rapidly" toward her car, narrowly missing it. She claimed that he then blocked her car to keep her from leaving, got out of his truck, and began screaming at her to get the child. He handed her a sheet of paper with his new address, which was a house located on the farm where he worked. He moved his truck when two patrol cars from the Brinkley Police arrived. She contended in the motion that his violation of the provision in the decree preventing him from taking the child on the farm and his repeated violent behavior at visitation exchanges constituted a material change in circumstances warranting modification of his visitation. She argued that it was in the child's best interest to restrict his visitation and to prevent his exercising visitation on the farm.

After a hearing, the circuit court entered an order finding that the parties had argued on at least three occasions during visitation exchanges but that neither party had violated the

decree; that Mr. Jones properly apprised Ms. Browning of his change of address; and that the parties were encouraged to continue telephone contact with the child. The court also found that Mr. Jones did not violate the parties' agreement by exercising his visitation on the farm, but it did caution him to keep the child away from the farm equipment. The court recognized that the decree provided that Mr. Jones would not take the child on the farm when he works for lengthy periods of time, but it credited Mr. Jones's testimony that the child was not exposed to any dangers on the farm from pesticides and large farm equipment. He denied the parties' request for contempt findings and denied Ms. Browning's motion for modification of visitation, finding no material change in circumstances. Ms. Browning brings three points on appeal; Mr. Jones did not file a responsive brief.

In reviewing a bench trial, we must determine whether the trial court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Brinkley v. Brinkley*, 2011 Ark. App. 195, at 2. 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. *Id.* We give special deference to the superior position of the trial judge to evaluate the credibility of witnesses and their testimony. *Id.*

I. *Contempt*

For her first point on appeal, Ms. Browning contends that the court erred in failing to find Mr. Jones in contempt for not notifying Ms. Browning of a valid address while the child was in his care and for "cussing" her and acting violently during visitation exchanges. We note that there was conflicting testimony on both of these contentions. Ms. Browning

testified that Mr. Jones provided the wrong address to a home he lived in for several months; he contends that he provided the correct address. With regard to the arguments during visitation exchanges, Ms. Browning and her mother both testified that Mr. Jones cussed at Ms. Browning and was aggressive and violent during several exchanges. Mr. Jones testified that he did not cuss; that it is difficult to talk with Ms. Browning without having a confrontation; and that at one exchange, he responded to her statement that he could not have his child because he was living by the farm by "hollering" at her to give him his daughter. He said that he thought she was going to leave with the child, so he blocked her exit with his truck until the police arrived to help him with the exchange.

Ms. Browning asked the court to hold Mr. Jones in criminal contempt. A criminal contempt citation must be based on evidence beyond a reasonable doubt. *Applegate v. Applegate*, 101 Ark. App. 289, 293, 275 S.W.3d 682, 685 (2008) (quoting *Feiock v. Feiock*, 485 U.S. 624, 632 (1988)). There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry a greater weight than those involving the custody of minor children, and our deference to the trial judge in matters of credibility is correspondingly greater in such cases. *Boudreau v. Pierce*, 2011 Ark. App. 457, at 12, ___ S.W.3d ___, ____. The evidence here was conflicting. And, in spite of Ms. Browning's testimony, the court found that the weight of the evidence did not support her allegations. We cannot say that the court clearly erred in denying her request for a finding of contempt.

II. *Farm Provision*

For her second point, Ms. Browning contends that the court erred by, "in effect," modifying the farm provision of the parties' independent contract. She argues that the court cannot modify an independent contract in a divorce decree and that there were no changed circumstances here warranting modification in any case. The "farm provision" states as follows: "Husband agrees that he will not allow the child near pesticides or farm equipment and will not keep the child on the farm (or in his truck while working on the farm) for extended periods of time."

First, although this was a part of the parties' incorporated custody, support, and property-settlement agreement and a court generally cannot modify a contract that is incorporated into a divorce decree, there is an exception for provisions pertaining to child-custody and support matters, which are not binding on the court. *Stevenson v. Stevenson*, 2011 Ark. App. 552, at 4; *Warren v. Kordsmeier*, 56 Ark. App. 52, 938 S.W.2d 237 (1997). Moreover, the court did not modify this provision but rather interpreted it as not having been violated. The testimony indicated that Mr. Jones's home was next to the farm where he works. There was absolutely no evidence that the child was ever on the farm while he was working, and he testified that she had not ridden on any of the farm equipment or been near pesticides. From the bench at the hearing, the court addressed Ms. Browning, recognizing her concerns about farming and agreeing that it was a dangerous occupation. But the court concluded by saying, "Your daughter is not farming. She's not out there. I have heard no testimony that she's been on a combine, that she's been on a tractor, that she's been exposed

to pesticides or whatever." He then noted that everyone in east Arkansas is exposed to pesticides and there wasn't much Ms. Browning could do to prevent that since the child's father lived in east Arkansas. The court did not modify the provision but instead found that Mr. Jones had done nothing to violate it.

III. *Modification of Visitation*

Finally, Ms. Browning contends that the circuit court erred in denying her request for modification of Mr. Jones's visitation. She argues on appeal that Mr. Jones's cussing at visitation exchanges and his living on the farm constituted material changes in circumstances. The court disagreed and found no material change in circumstances.

A circuit court maintains continuing jurisdiction over visitation and may modify or vacate those orders at any time when it becomes aware of a change in circumstances or facts not known to it at the time of the initial order. *Martin v. Scharbor*, 95 Ark. App. 52, 55, 233 S.W.3d 689, 692 (2006). Although visitation is always modifiable, to promote stability and continuity for the children and to discourage repeated litigation of the same issues, courts require more rigid standards for modification than for initial determinations. *Meins v. Meins*, 93 Ark. App. 292, 301, 218 S.W.3d 366, 371 (2005). Thus, the party seeking a change in visitation has the burden to demonstrate a material change in circumstances that warrants such a change. *Brown v. Brown*, 2012 Ark. 89, at 6, ___ S.W.3d ___, ____. We review these cases de novo, but we will not reverse a circuit court's findings unless they are clearly erroneous. *Taylor v. Taylor*, 353 Ark. 69, 77, 110 S.W.3d 731, 735 (2003). The question of whether the circuit 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. *Sharp v. Keeler*, 99 Ark. App. 42, 44, 256 S.W.3d 528, 529 (2007). Ms. Browning merely reargues the evidence from her previous points here. The court listened to the conflicting testimony and disagreed with Ms. Browning's assessment of the situation. We hold the court's order denying modification of visitation was not clearly erroneous.

Affirmed.

HART and WYNNE, JJ., agree.

Tyson K. Spradlin, for appellant.

No response.