

ARKANSAS COURT OF APPEALSDIVISION II
No. CV-12-1041

RICHARD HERRING

APPELLANT

V.

KRISTIE HERRING (now BECK)

APPELLEE

Opinion Delivered MAY 22, 2013

APPEAL FROM THE UNION
COUNTY CIRCUIT COURT
[NO. DR-12-173-6]HONORABLE DAVID F. GUTHRIE,
JUDGE

AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Richard Herring and appellee Kristie Herring (now Beck) have two minor children. They were divorced in May 2008, and Kristie was awarded custody of the children. In August 2011, Richard filed a petition to change custody and alleged there existed a substantial change of circumstances and that it was in the children's best interest for him to obtain custody. A hearing was held on July 21, 2012, and the circuit court denied the petition. Richard appeals that decision. We affirm.

The circuit court found that Richard's evidence was controverted to such a degree that he failed to prove the allegations by a preponderance of the evidence. Richard contends on appeal that the circuit court's decision was clearly erroneous. There was considerable conflicting and controverted evidence introduced at the trial of this matter. Richard testified that he is a diesel mechanic and works ten hours a day, four or five days a week. He stated

that his girls have deficiencies in reading, and one of his daughters has a deficiency in math. He said that he will have them in tutoring to make sure the girls are where they need to be. He also said that when he picks up the children they are not clean and that they have an odor about them. Richard also testified that the criminal history of Kristie's new husband, Chris Beck, is a concern to him. There was evidence that eight years earlier Chris Beck had been charged with various offenses.

Linda Herring, Richard's mother, testified that on one occasion she noticed that one of the girls had bruises on her arms and took her to the doctor. A medical report was entered into evidence, which stated that "Grandmother relates the older sister said (the younger sister) sustained bruises two or three days ago when she made a face at her mother's boyfriend [Chris Beck], he grabbed both arms and squeezed them very tight. Apparently there were no other injuries sustained, according to the sister, the mother was present." Richard's mother also testified that when Richard picks up the children for visitation, the children appear to be unclean, dirty, and have an odor about them. She said Kristie's home was always dirty, but she admitted that she had not been in Kristie's house since Kristie remarried. She said that Richard and his current wife work and that when they are working, they have babysitters who care for the children.

Deborah Herring, Richard's new wife, testified that she and Richard had been married for three years. She said that she and her husband work full time. She said that when she picks up the children for visitation, she always takes someone with her because she and Kristie cannot communicate. She said that she put the children in tutoring. She testified that when

the children visit, she and Richard take them to church. She stated that when she picks up the children for visitation they appear unkempt, are dirty, and have an odor about them. She also said that the children sleep together and that they began doing so when Kristie married Mr. Beck.

Carolyn Willett, mother of Richard's current wife Deborah Herring, testified that she visits Richard's home regularly. She said she also rides with Deborah to pick up the children for visitation and that the children look like "ragamuffins." She said they do not look or smell clean. She also said the girls have nightmares when they are staying at Richard's house.

On the other side of the ledger was the evidence presented on behalf of appellee. Kristie testified that she had recently married Chris Beck. She denied the episode in January 2010, where it was alleged that Mr. Beck grabbed one of her daughters by the wrist leaving bruises. She said that she was investigated by the Arkansas Department of Human Services about the incident and that the allegations were unfounded. She acknowledged that Chris Beck had criminal charges in the past, including battery in the third degree and violation of an order of protection. She denied that her children were scared of Chris Beck. She testified that because Chris Beck makes a comfortable living, she is able to stay home and take care of her children. She said she is involved in their school activities and their church activities. She testified that her children had done well in school, both in math and in reading, and had made good grades. She stated that one of her children had made honor roll for the past two nine weeks. She acknowledged that one of the daughters had a D in math but stated that she had taken them to get extra help with math and reading in the summer. She testified that she and

her children attended church regularly and that when Chris Beck, who is a long-distance truck driver, is in town, he attended church with them. She stated that she and Richard do not communicate well.

Chris Beck, Kristie's new husband, testified and admitted to having criminal convictions in his background from eight years earlier. He said he has a good relationship with his stepdaughters. He said that when he is home, his stepdaughters are happy to see him. He said that he respects Richard as the children's father. He admitted to having a problem with communication with Richard and said that he had contacted Richard recently to work things out, but that Richard was not interested. He testified that the children have a trampoline, a swimming pool, and a nice yard in which to play. He stated that he and Kristie do not use babysitters and that he does not keep the girls by himself. He said that although he has raised his voice at the girls, he has never administered corporal punishment. He admitted to smoking marijuana in the past but stated that he had not done so for over eight years.

In addition to testimony from the parties and their respective family members, the court heard testimony from three pastors. George Whitten, a pastor at New Beginnings Baptist Church, testified on behalf of Richard. Pastor Whitten testified that Richard and his wife are active members of his church. Dwayne Miller and Darin Shelton, pastors of Cross Life Church, each testified on behalf of Kristie. Pastor Miller testified Chris Beck and Kristie are active members in his church and that the children are at the church every time the door opens. He also said that he performed the wedding of Chris Beck and Kristie. He testified

that the children have good hygiene and that they have a very healthy and loving relationship with their mother. He also testified that the children appear to have a good relationship with Chris Beck and that the relationship appears to be warm, gentle, kind, and not strained whatsoever. He said that they do not fear Mr. Beck. He stated that when the children come to church they are smiling, happy, well-adjusted, well-groomed, well-dressed, and well-fed. Pastor Shelton testified that he and Mr. Beck are personal friends and that he visits Chris Beck's home often. He stated that there is nothing concerning Mr. Beck's personality or conduct that would lead him to be concerned about the welfare of the stepchildren. He also stated that he spends time around the children and nothing about their hygiene causes him concern.

The court had previously appointed an attorney ad litem for the children. The attorney ad litem testified that the children told her that they wanted to live with their father, but she recommended that they continue to live with their mother.

At the conclusion of the hearing, the court took the case under advisement. On August 10, 2012, it rendered an order denying Richard's petition. The court found that the criminal convictions concerning Mr. Beck had taken place in previous years and that no recent convictions caused an alarm. The court found the testimony credible that Mr. Beck was active in his church and found credible the testimony of Mr. Beck's pastor that Mr. Beck's demeanor was favorable to the condition of the children. The court found that the testimony concerning the care and maintenance of the children did not weigh heavier on

the side of Richard. The court concluded that Richard had failed to prove his allegations by a preponderance of the evidence.

In *Hamilton v. Barrett*, 337 Ark. 460, 466, 989 S.W.2d 520, 523 (1999), the court set forth its standard of review in equity cases. In reviewing equity cases, we consider the evidence de novo but will not reverse a circuit 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 circuit 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 circuit court is even greater in cases involving child custody, as a heavier burden is placed on the circuit court to utilize to the fullest extent his or her 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).

Custody is not altered absent a material change in circumstances, and the party seeking modification of the child-custody order has the burden of showing a material change in circumstances. *Calhoun v. Calhoun*, 84 Ark. App. 158, 138 S.W.3d 689 (2003). In deciding a petition for change of custody, the trial court must first determine whether there has been a significant change in the circumstances of the parties since the most recent custody decree. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996). Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). Where the circuit 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 circuit 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).

Applying our standard of review and deferring to the court's findings concerning the credibility of the witnesses, we cannot say that the court's findings were clearly erroneous or against the preponderance of the evidence. There was conflicting evidence as to whether or not Kristie maintained proper hygiene of the children. Richard's current wife and her mother testified that when they picked up the children for visitation with the appellant, the children were not properly groomed and had an odor about them. However, conflicting testimony was presented by appellee and her pastors that the children were always properly groomed and cared for and they never noticed the children had an odor about them. Conflicting testimony was also presented that the children's grades were in need of improvement. Richard presented testimony that the girls were in need of tutoring. However, Kristie presented evidence that the girls' grades had not fallen recently and that she had obtained assistance during the summer. In addition, Richard presented evidence of Chris Beck's criminal history. However, testimony was also presented that these criminal events had taken place more than eight years ago, and it is clear the court believed that Chris Beck did not have any recent criminal incidents that would cause alarm. Each party presented evidence that they took the children to church on a regular basis. With all of the conflicting testimony and evidence presented, we cannot say that the circuit court's decision was clearly erroneous or against the preponderance of the evidence; therefore, we affirm.

Affirmed.

GLADWIN, C.J., and BROWN, J., agree.

Ronald L. Griggs, for appellant.

No response.