

SUPREME COURT OF ARKANSAS

No. 12-379

LINDA L. YOUNG

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES, TIM SEXTON,
DANIELLE SEXTON, AND MINOR
CHILD

APPELLEES

Opinion Delivered September 20, 2012

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[NO. JV2008-724-3]HONORABLE STACEY
ZIMMERMAN, JUDGEAFFIRMED.**JIM HANNAH, Chief Justice**

Linda Young appeals a decision of the Washington County Circuit Court, Juvenile Division, denying her petition for change of custody, denying a petition for citation of contempt for parental alienation, and excluding expert testimony. Young asserts that the circuit court committed clear error in failing to order a change in custody. She also alleges that the circuit court abused its discretion in excluding expert testimony. We affirm.

We are presented with the question of whether a circuit court may reopen a closed dependency-neglect case prosecuted under the Arkansas Juvenile Code. We hold that the circuit court may not reopen the case. A dependency-neglect case is closed when the child is no longer dependent-neglected under the Juvenile Code (resolved in this case by a grant of permanent custody). The Juvenile Code provided jurisdiction while S.S. was dependent-neglected. There was no jurisdiction under the Juvenile Code to reopen the case. Because

this is an issue of first impression, our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(1).

In January 2008, Young, then Linda Lamontagne, was involved in an accident while driving intoxicated, and in which her daughter S.S. was injured. A dependency-neglect proceeding was opened under the Juvenile Code, and the Arkansas Department of Human Services (DHS) sought and obtained custody of S.S. However, those proceedings were closed, and the case under the Juvenile Code was dismissed when Tim and Danielle Sexton were granted permanent custody of S.S. In this same order, Young was granted visitation rights that included overnight stays.

The Sextons commenced the present action on April 11, 2011, when they filed an emergency ex parte petition to modify visitation in circuit court seeking to stop all contact and visitation between S.S. and Young. In an April 15, 2011 order, the circuit court purported to reopen the closed dependency-neglect case under the Juvenile Code. Young responded to the Sextons' petition and counterclaimed for custody. The circuit court held what it referred to as a "permanency planning hearing" on January 25, 2012, and on February 24, 2012, entered an order that custody remain with the Sextons and that Young's visitation be restricted to bimonthly supervised visits. The circuit court also ordered that the "reopened" dependency-neglect case be closed.

This court reviews child-custody cases de novo. *Orantes v. Orantes*, 2011 Ark. 159, at 5, ___ S.W.3d ___, ___. We provide a de novo review on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. A finding is clearly

erroneous when the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. *Kelly v. Hill*, 368 Ark. 200, 207, 243 S.W.3d 886, 890 (2006). We give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given their testimony. However, a trial court's conclusions of law are given no deference on appeal. *Stehle v. Zimmerebner*, 375 Ark. 446, 456, 291 S.W.3d 573, 580 (2009).

The circuit court erred in applying the Juvenile Code because the dependency-neglect case could not be reopened. Once the juvenile division of the circuit court ordered that S.S. be placed in the permanent custody of the Sextons, she was no longer dependent-neglected. She came into dependency-neglect proceedings due to parental neglect and parental unfitness. See Ark. Code Ann. § 9-27-303(18)(A)(v), (vi) (Supp. 2007). The 2009 permanency-planning order resolved the dependency-neglect issue and terminated the action under the Juvenile Code.¹

We note that the circuit court had jurisdiction to hear this case even though it concerned child-custody law and was outside the subject of proceedings in the juvenile division. Amendment 80 provides that the circuit courts are the trial courts of general jurisdiction not otherwise assigned and that the Arkansas Supreme Court may divide the

¹We note that when the Sextons commenced this action, they mistakenly filed their petition under the case name and case number for the closed dependency-neglect proceeding, and the circuit court errantly attempted to reopen that case. The Arkansas Department of Human Services participated in this action, and S.S. again received representation through an attorney ad litem because the circuit court purported to reopen the dependency-neglect action. However, given that this was an action under child-custody law, DHS was not a necessary party.

circuit courts to hear specific matters and subjects pursuant to its superintending control. *See* Ark. Const. amend. 80, § 6. Arkansas Supreme Court Administrative Order No. 14 provides that the “designation of divisions is for the purpose of judicial administration . . . and is not for the purpose of subject matter jurisdiction.” *See* Ark. Sup. Ct. Admin. Order No. 14(a). Further, “the creation of divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the circuit court.” *Id.* Therefore, even if the matter was one under general-custody law, the juvenile division of the circuit court had jurisdiction to hear it.

We now turn to the merits of Young’s arguments regarding a change of custody. The burden is on the person seeking to change custody to prove that there is a material change of circumstances that makes a modification of the custody decree in the best interest of the child. *See Stills v. Stills*, 2010 Ark. 132, at 12, 361 S.W.3d 823, 830. “To facilitate stability and continuity in the life of a child and to discourage repeated litigation of the same issues, custody can be modified only upon a showing of a material change of circumstances.” *Orantes*, 2011 Ark. 159, at 6, ___ S.W.3d at ___. “A decree fixing the custody of a child is final on conditions then existing and should not be changed unless there are altered conditions since the decree was rendered or there were material facts existing at the time of the decree, but unknown to the court, and then only for the welfare of the child.” *Lloyd v. Butts*, 343 Ark. 620, 625, 37 S.W.3d 603, 606–07 (2001). A noncustodial parent cannot meet the burden of proof by merely showing that his or her circumstances have materially changed. Rather, in order to maintain the goals of stability and continuity for the child, a

circuit court may not consider a change of custody unless evidence of some material change in circumstances shows that it is in the child's best interest to consider a change of custody. "Custody awards are not made or changed to punish or reward or gratify the desires of either parent." *Harris v. Grice*, 97 Ark. App. 37, 41, 244 S.W.3d 9, 13 (2006).

While the circuit court errantly attempted to decide this case under the standards for deciding permanency placement, *see* Ark. Code Ann. § 9-27-338 (Supp. 2011), the circuit court in a lengthy order concluded that, while Young had made progress with respect to her mental health, had a clean house, and had made other advances in improving her capacity to care for S.S., "it is clearly *not* in . . . [S.S.'s] best interest to be placed in the custody of her mother." The circuit court expressed specific concern regarding misconduct that *allegedly* occurred on recent overnight visits. It is apparent that the circuit court carefully considered Young's assertion that she had made substantial changes and was ready to assume custody. Despite these alleged material changes, the circuit court concluded that it was not in S.S.'s best interest to change custody.² This conclusion is reinforced by the fact that visitation was reduced from extended unsupervised visits, including overnight stays, to supervised visits for only a few hours per month. The decision of the circuit court denying the petition for

²Young asserts that, because she is a fit parent, the circuit court erred in denying her custody. First, there was no finding that Young was fit. Second, this is a child-custody case in which custody has already been granted to someone other than a parent, not a dependency-neglect case where the issue of custody is being decided in the first instance. *See Mahone v. Ark. Dep't of Human Servs.*, 2011 Ark. 370, ___ S.W.3d ___. This court has stated that courts generally impose more stringent standards for modification in custody than for initial determinations of custody in order to promote stability and continuity in the life of the child. *See Stehle v. Zimmerebner*, 375 Ark. 446, 454, 291 S.W.3d 573, 579 (2009).

change of custody and modifying visitation is affirmed.

Young also asserts that the circuit court erred in refusing to permit her expert, Dr. Virginia Krauft, to testify regarding alienation of S.S.'s affection. The circuit court ruled that Krauft could not testify as an expert on this issue because she had not interviewed S.S. or the Sextons. We cannot say that exclusion of this evidence on this basis constituted discretion "exercised thoughtlessly and without due consideration." *Lake Village Health Care Ctr. v. Hatchett*, 2012 Ark. 223, at 16, ___ S.W.3d ___, ___.

Affirmed.

George D. Oleson and Lee H. Linzay, for appellant.

Tabitha B. McNulty, Office of Chief Counsel, for appellee Arkansas Department of Human Services.

Chrestman Group, PLLC, by: *Keith L. Chrestman*, for appellee S.S.