

# ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA11-578

SUSAN COLLIER

APPELLANT

V.

MEL COLLIER

APPELLEE

Opinion Delivered February 15, 2012

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT,  
[NO. E-2002-1868-5]

HONORABLE JOANNA TAYLOR,  
JUDGE

AFFIRMED

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**RITA W. GRUBER, Judge**

Susan Collier and Mel Collier, parents of a son born in 2002 and a daughter born in 2003, were divorced by order of the Washington County Circuit Court in September 2003. The court awarded the parties joint custody of the children consistent with a custody, support, and property-settlement agreement that was incorporated into the decree of divorce. Ms. Collier appeals the court's subsequent order of February 2011 severing joint custody and awarding primary custody to her ex-husband. She contends that the circuit court erred in modifying the custody arrangement because the evidence showed that continuing joint custody was in the best interests of the children. We affirm.

Although permitted by statute, *see* Ark. Code Ann. § 9-13-101(b)(1)(A)(ii) (Supp. 2011), joint custody of minor children is not favored in Arkansas. *Dansby v. Dansby*, 87 Ark. App. 156, 165–66, 189 S.W.3d 473, 480 (2004). A change of custody requires the trial court to first determine whether a material change in circumstances has occurred since the last order



of custody; if the threshold requirement is met, the trial court then must determine who should have custody, with the sole consideration being the best interest of the child. *Zobrist v. Zobrist*, 2010 Ark. App. 537, at 1. A crucial factor bearing on the propriety of joint custody is the parents' mutual ability to cooperate in reaching shared decisions in matters affecting the welfare of their children; when the parties fall into such discord that they cannot cooperate in sharing the children's physical care, a material change in circumstances affecting the children's best interest has occurred. *Dansby*, 87 Ark. App. at 166, 189 S.W.3d at 480.

Mr. and Ms. Collier filed competing motions that joint custody be changed and that primary custody be awarded to that parent, with each motion stipulating to a material change in circumstances concerning the best interests of the children.<sup>1</sup> Ms. Collier asserted as one basis of changed circumstances that the parties could no longer communicate in the way required of joint custodians. At the hearing on the motions to modify custody, the court orally accepted the stipulation and found that a material change of circumstances existed.

Among the witnesses who testified at the hearing were Mr. and Ms. Collier, their son's first- and second-grade teachers, child psychiatrist Dr. Matthew Crouch, counselor Shannon West, and Mr. Collier's current girlfriend. Exhibits introduced into evidence included 2011 psychological examinations of the parties and the two children. Testimony about the Colliers'

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<sup>1</sup>The first filing was Ms. Collier's December 2009 petition for contempt and modification of decree, which requested that she be awarded primary custody of the children. Mr. Collier answered and counterclaimed for modification, requesting that primary custody be awarded to him. Ms. Collier then filed an amended petition. An order of September 2005 had refined the original divorce decree, in part requiring that in non-emergency situations the parties notify each other of medical appointments and communicate through home email rather than at work.



children centered primarily on the son.

The parties each testified that the following events occurred after the 2003 divorce: their son struggled with social functioning and learning difficulties, and had been held back a year in school; Mr. Collier had various girlfriends, and Ms. Collier had contacted some of them; and the Colliers had an intermittent sexual relationship until the fall of 2009, at which time communication between them was reduced primarily to email. Their testimony revealed that Ms. Collier surreptitiously made audio recordings upon entering or leaving the children's school if she saw Mr. Collier's car there; during custody exchanges with Mr. Collier, although the couple seldom spoke to one another at those times; when he and his girlfriend came to the son's soccer field; at sessions with the son's psychiatrist; and during her children's conversations. The parties' testimony differed regarding babysitting, notification of one another about medical appointments, and Mr. Collier's participation in the children's activities. They agreed that joint custody had become unworkable because of their inability to communicate, and Ms. Collier testified she believed "that the present custodial arrangement is no longer working and that the judge should make one of us the primary custodian."

Dr. Crouch testified that he began seeing the Colliers' son in October 2009 for medication management and psychotherapy, and that the child had ADHD and anxiety issues. Dr. Crouch stated that the boy was in a "common state" where children fantasize about their parents being back together; he had been exposed to adult talk, leading to anxiety in the home setting; contrary information had been presented to him, contributing to his dysfunction; and his symptoms had been dramatically exacerbated by the custody situation in which his parents



did not get along. Dr. Crouch said that the Colliers each had good parenting qualities. He opined that the joint custody arrangement should not be changed because of the length of time it had existed, the son's adaptability to it, and the disruption it would cause to his routine; and that the custody battle, which put stress on children as well as parents, needed a final resolution.

Shannon West, a licensed professional counselor with a private practice, testified that she had play-therapy sessions with the Colliers' son from January 2009 through December 2010 to address anxiety, impulse control, and aggression. She believed that the child's issues were related to his parents' divorce and, as is very common in children, he wanted his parents to get back together. She said that had the Colliers been intermittently engaging in a sexual relationship and been going on vacation with their children, it would reflect on the parties' lack of consideration regarding sending mixed signals to the children.

In oral findings at the conclusion of the hearing, the court reiterated the parties' agreement of changed circumstances based on their inability to communicate. Applying the two-part test of changed circumstances and the children's best interests, the court noted that neither parent had "an extraordinary amount of maturity" and that psychological examinations of the parties indicated that each viewed their occasional sexual relationship differently. The court noted a lack of evidence that Shannon West and Dr. Crouch, both of whom were hired to help the Colliers' son, were given information about their ongoing sexual relationship; that the child saw his parents together, then saw his dad dating other women; that the parents did not present a good reality to him; and that neither parent



understood the effect of their continuing relationship on their children. Concluding that joint custody clearly could not continue, the court changed custody to Mr. Collier.

We conduct a de novo review of cases involving child custody and related matters, but we do not reverse the trial court's findings unless they are clearly erroneous. *Dansby*, 87 Ark. App. at 160, 189 S.W.3d 473, 476. 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.*

The findings of the court clearly demonstrate not only that the court accepted the parties' stipulation that a change of circumstances materially affecting the children's best interests had occurred, but that the court considered ample evidence supporting the stipulation as well. Based on our review of the record, and giving due deference to the superior position of the court to make that determination, the court did not clearly err in finding that joint custody could not continue and that it was in the best interests of the minor children that primary custody be awarded to Mr. Collier.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.

*Clark & Spence*, by: *George R. Spence*, for appellant.

*Taylor Law Partners, LLP*, by: *William B. Putman*, for appellee.



Cite as 2012 Ark. App. 146