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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA12-649

Opinion Delivered April 24, 2013

JARED B. LANE APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [DR-2011-708-4]
V.	HONORABLE G. CHADD MASON, JUDGE
SUSAN R. BLEVINS APPELLEE	REVERSED AND REMANDED

DAVID M. GLOVER, Judge

Appellant, Jared Lane, and appellee, Susan Blevins, were never married but had two children together, R.L. (d.o.b. 2-11-2008) and S.L. (d.o.b. 10-15-2009). On April 22, 2011, the Office of Child Support Enforcement filed a complaint for child support against Jared. OCSE also filed a complaint against him to establish paternity of the children. On July 14, 2011, Jared filed his answer, admitting paternity, along with a third-party complaint for custody against Susan. Following the February 22, 2012 hearing, the trial court entered its order finding that Jared had failed to establish a material change of circumstances that would warrant a change of custody and that Susan should maintain primary custody of the parties' two minor children, subject to Jared's right to reasonable visitation. In this appeal, Jared contends 1) that the trial court erred in requiring him to

prove a material change of circumstances because it was an initial custody determination with the paternity action, and 2) that the trial court's decision to award custody to Susan was clearly erroneous and not in the children's best interest. Finding merit in the first point of appeal, we reverse and remand this matter to the trial court.

In making his argument that he should not have been required to prove a material change of circumstances, Jared relies upon the cases of *Donato v. Walker*, 2010 Ark. App. 566, 377 S.W.3d 437, and *Harmon v. Wells*, 98 Ark. App. 355, 255 S.W.3d 501 (2007). In *Donato,* our court explained:

> Ms. Donato claims that case law, specifically *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993), requires an unmarried biological father to establish a material change in circumstances in addition to the criteria set forth in section 9-10-113(c) in order to obtain custody.
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> In *Norwood*, a finding of paternity was made in 1989 that included provisions for visitation and payment of child support by the father. *Norwood*, 315 Ark. at 256, 866 S.W.2d at 399. Custody vested in the mother pursuant to Ark. Code Ann. § 9-10-113(a). Over two years later, in 1991, the father filed a motion for a change of custody. *Id.* at 257, 866 S.W.2d at 400. On appeal from the denial of his motion, the father contended that the trial court erred by requiring him to show a material change of circumstances since the finding of paternity. *Id.* at 256, 866 S.W.2d at 399. The court recognized that in a traditional change-of-custody case, a party must show a change in circumstances since the initial custody order. *Id.* at 259, 866 S.W.2d at 401. The court rejected the father's contention that there had been no initial determination of custody and held that an initial custody award in the mother was implicit in the paternity order establishing visitation two years earlier. *Id.* Thus, the court held that the same standards that applied in other custody determinations must be applied to the situation in *Norwood*—that is, a material change in circumstances must be shown for a change of custody. *Id.*
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> This court has distinguished *Norwood* in several cases where the father requested custody at the time paternity was established—that is, there had been no initial custody determination. In 2004, this court decided *Sheppard v. Speir*, 85 Ark.

> App. 481, 157 S.W.3d 583 (2004). In *Speir*, the mother appealed the trial court's order awarding custody to the biological father, contending that the father failed to prove a material change in circumstances. *Speir*, 85 Ark. App. at 588. We rejected her argument and distinguished the case from *Norwood* because Mr. Speir's petition for custody was filed before an order of paternity had been entered and was consolidated with his paternity complaint. We held that the issue of custody had not been resolved and therefore Mr. Speir was not required to show a material change in circumstances.
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> In two subsequent cases, we clarified that whether a biological father must show a material change in circumstances in addition to the requirements set forth in Ark. Code Ann. § 9-10-113(c) depends upon whether there has been an initial custody determination at the time the father petitions for custody. [Citations omitted.] In this case, Mr. Walker sought to establish paternity and obtain custody at the same time. The parties lived together with S.W. as a family until June 2009, when Mr. Walker filed his petition. There had never been an order awarding custody of S.W. to either party before that time. The parties agreed that the August 6, 2009 hearing was a final hearing on the order of protection, paternity, and custody. So Mr. Walker was not required to show a material change of circumstances in order to obtain custody of S.W.

2010 Ark. App. 566, at 4–6, 377 S.W.3d at 440–41.

Here, the parties lived together for approximately six years. They separated briefly after the birth of their first child, reunited, and then permanently separated after the birth of their second child. It is undisputed that they had a verbal custody/visitation agreement under which they operated, but there was no court order regarding paternity or custody. Accordingly, we have concluded that the facts of this case fall under the explanation offered in *Donato*, *supra*.

That is, the February 22, 2012 hearing and the April 20, 2012 order represented the initial paternity/custody determination concerning these parties and these children. Consequently, the trial court erred in treating the matter as a change of custody and

requiring Jared to establish a material change of circumstances that would justify a "change" of custody. We therefore reverse and remand this case for the trial court to employ the correct analysis. Because remand is required under Jared's first point of appeal, we do not address his second point.

Reversed and remanded.

WALMSLEY and WHITEAKER, JJ., agree.

Rhoads Law Firm, by: *Johnnie Emberton Rhoads*, for appellant.

Charles L. Stutte, for appellee.