

# ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CV-12-769

STEPHEN DAVID DAVENPORT  
APPELLANT

V.

KATHERINE ANN DAVENPORT  
USELTON  
APPELLEE

Opinion Delivered May 22, 2013

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT,  
GREENWOOD DISTRICT  
[NO. DR-2007-88G]

HONORABLE JIM D. SPEARS,  
JUDGE

AFFIRMED IN PART; REVERSED  
AND REMANDED IN PART FOR  
CLARIFICATION

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**PHILLIP T. WHITEAKER, Judge**

Stephen Davenport appeals from a Sebastian County Circuit Court order denying his motion for contempt against his former wife, Katherine Ann Davenport (Uselton), for violating the overnight-guest prohibition in their divorce decree and denying his motion to modify visitation. We affirm the denial of visitation modification. We reverse and remand for clarification of the order denying the motion for contempt.

Uselton and Davenport were divorced in 2008. Davenport was granted full custody of the parties' three minor children, C.D., K.D., and B.D., with Uselton receiving visitation. The divorce decree provided, in part, that the parties "shall not have any overnight guests that they are romantically involved with in the presence of their minor children."

In October 2011, Davenport filed a motion for contempt partly on the basis that



Uselton was residing with someone in violation of the overnight-guest provision of the divorce decree. He also requested that the court-ordered visitation schedule be modified because of the distance between the parties and Uselton's living situation. Uselton responded, denying the allegations contained in the motion to modify and for contempt.

The circuit court entered an order denying Davenport's motion to modify visitation, finding that there had not been a material change of circumstances sufficient to warrant modification. 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, 387 S.W.3d 159. Davenport requested that visitation be modified because the traveling distance between the parties had increased due to relocation of residence. Davenport was the party who relocated, not Uselton. A party should not be permitted to allege a material change of circumstances that he himself has created. *See id.* Davenport also requested visitation modification because of Uselton's cohabitation. Uselton's cohabitation had previously been litigated before the court. The facts surrounding Uselton's previous cohabitation and her current cohabitation were evidence the circuit court considered in the modification request. 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 circuit court 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). Based on our deference to the superior position of the circuit court, we cannot say that the circuit court's findings are clearly erroneous. Thus, we affirm the circuit court's order denying the modification of visitation.

The circuit court's order also denied the motion for contempt. The order contains what appear to be inconsistent findings that require clarification. The circuit court specifically found that Uselton was living with someone with whom she was romantically involved. The court found that Uselton was "willfully" exercising her visitation with the minor children while her partner was present overnight. Despite this factual finding, the court concluded that it would not hold Uselton in contempt. We are unable to reconcile these findings.

A contempt proceeding is a cause of action to enforce valid orders of a court. Contempt is a matter between the judge and the litigant and not between the two opposing litigants. See *Hickinbotham v. Williams*, 228 Ark. 46, 305 S.W.2d 841 (1957); cf. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (noting that contempt, Rule 11 sanctions, and award of attorneys' fees are all actions separate and apart from the underlying proceeding and that all three actions concern the integrity of the court and judicial process, not the merits of the underlying claim). Before a person can be held in contempt for violating a court order, the order must be definite in its terms, clear as to what duties it imposes, and express in its commands. E.g., *Lilly v. Earl*, 299 Ark. 103, 771 S.W.2d 277 (1989). When a finding of



contempt has been made, the circuit court has discretion to fashion the punishment to fit the circumstances. *Conlee v. Conlee*, 370 Ark. 89, 257 S.W.3d 543 (2007). The circuit court may, in its wide discretion, choose to assign much, little, or no punishment at all for a contempt citation. See *Johnson v. Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975).

The decree of the circuit court contained a provision prohibiting the parties from having overnight romantic partners while the children were present. Uselton never challenged the validity of the underlying court-ordered overnight-guest provision below. Rather, she argued that her conduct did not fall within the provision. The court specifically found that her conduct fell within the provision and found that her violation of that provision was willful. Willful disobedience of a valid order of a court is, by definition, contemptuous behavior. See *Henderson v. Dudley*, 264 Ark. 697, 710, 574 S.W.2d 658, 666 (1978) (“[T]he disobedience of any valid judgment, order or decree of a court having jurisdiction to enter it is such an interference with the administration of justice as to constitute contempt.”). Yet, the court did not find her in contempt. Because we cannot reconcile these two findings, we reverse and remand.

On remand, the circuit court is directed to resolve the apparent inconsistencies in its findings, as set out above, and may fashion a punishment within its discretion.

Affirmed in part; reversed and remanded in part for clarification.

WALMSLEY and GLOVER, JJ., agree.

*Kevin L. Hickey*, for appellant.

*Huffman Butler, PLLC*, by: *Bryan R. Huffman*; and *Bugeja Law Firm*, by: *Joshua Bugeja*, for appellee.