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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-1170

	Opinion Delivered November 11, 2009
JASON SHIVELY APPELLANT	APPEAL FROM THE CLEBURNE COUNTY CIRCUIT COURT [NO. DR2004-164-2]
V.	HONORABLE JOHN NORMAN HARKEY, JUDGE
MICHELLE SHIVELY PLAUTZ APPELLEE	AFFIRMED

M. MICHAEL KINARD, Judge

Appellant, Jason Shively, appeals from the circuit court order denying his petition for modification of custody of the parties' minor daughter. We affirm the decision of the circuit court.

The parties were married on March 24, 2001, and divorced on January 21, 2005. The parties have one minor child, a daughter who was born in 2003. Appellee was granted sole custody of the child in the divorce, and appellant was granted standard visitation. Appellee has remarried and resides in Cleburne County. Appellant has remained single and resides in Bryant. Appellee's parents reside in Cleburne County, and appellant's parents live in Louisiana.

Since their divorce, the parties have had what can best be described as a rancorous relationship. On June 30, 2006, appellant filed a motion for contempt against appellee,

alleging that she refused to allow him to exercise visitation with the child and that appellee had taken action during the exchanges of the child that made the exchanges more difficult. On August 4, 2006, appellee filed a petition to restrict or terminate visitation, alleging that the child lost up to five pounds in a week while in appellant's care and that the child expressed an "unnatural fear" and cried when she saw appellant. On June 18, 2007, appellee filed a motion for ex parte and immediate suspension of summer visitation. In the motion, appellee alleged that the child began acting inappropriately and making inappropriate comments following a weekend visit with appellant in May 2007. Based upon this behavior, appellee took the child to the Cleburne County Sheriff's Department to be interviewed by a detective. The interview resulted in an investigation into possible sexual abuse against the child by appellant. On June 19, 2007, appellant filed a motion for change of custody. On June 20, 2007, the circuit court entered an agreed order for immediate suspension of summer visitation. The Arkansas Department of Human Services (DHS) was preparing to take the child into its custody, ostensibly based upon the allegations against appellant.[1] The agreed order states that it was entered in order to keep the child out of foster care.

After the summer ended, appellee refused to allow appellant to exercise his visitation, which resulted in an amended verified motion of contempt being filed by appellant on October 29, 2007. Appellee responded to the motion by stating that DHS would take the

[1]On November 26, 2007, an administrative law judge with the Arkansas Department of Human Services' Office of Appeals and Hearings entered an order finding that the allegations against appellant were not true. There is no indication in the record that criminal charges were ever pursued.

child into custody if she allowed appellant to exercise his visitation. On December 10, 2007, the circuit court entered an agreed temporary order granting appellant visitation.

A hearing was held on appellant's motion for change of custody and appellant's motions for contempt on February 21, 22, and 23, 2008. At the hearing, Dr. Paul Deyoub, who had been ordered by the court to conduct an independent psychological evaluation of the child, testified that he did not believe that the child had been sexually abused by appellant. Dr. Deyoub also testified that the continued implantation in the child's mind that she had been abused was or would be harmful to her. He stated that the child did not interact with appellant in appellee's presence. He recommended that custody be changed to appellant. Sherry Presley, who had been the child's therapist since the summer of 2007, also stated that she believed the allegations of abuse by appellant were false. Ms. Presley's testimony indicated that the child had a normal relationship with appellant, although her actions indicated that she felt as though having fun with appellant was an act of disloyalty toward appellee. Appellee, appellee's husband, and appellee's parents all testified that they still believed that the child had been sexually abused.

The circuit court was shown videos of the exchanges of the child that occurred at appellee's parents' home. The testimony revealed that the videos showed quite protracted exchanges, during which appellee would tell the child things such as "Mommy knows you don't want to go," and appellant would be forced to physically remove the child from appellee's arms. In the December 10, 2007 temporary order, the court ordered that the

parties were to exchange the child at the Cabot Police Department, and that each parent could only have one other person present at the exchange. Appellee testified that she was unaware that any of her actions had harmed the child, and she testified that she would change her behavior.

On May 9, 2008, the circuit court entered an order in which it found appellee in contempt for violating previous court orders; however, the court declined to assess a punishment against appellee for her contempt. While the court expressed grave doubts about continuing custody of the child with appellee, the court declined to change custody, on the basis that appellee has a nearby support network of family while appellant lives alone in Bryant and his family lives in Louisiana. On May 13, 2008, appellant filed a verified motion for contempt and motion for immediate change of custody, alleging new violations of the court's orders by appellee since the hearing. Also on May 13, 2008, appellant filed a motion for new trial. On July 2, 2008, the circuit court denied appellant's motions. This appeal followed.

In child custody cases, we review the evidence de novo, but we do not reverse the findings of the trial court unless it is shown that they are clearly against the preponderance of the evidence. *Henley v. Medlock*, 97 Ark. App. 45, 244 S.W.3d 16 (2006). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hicks v. Cook*, 103 Ark. App. 207, 288 S.W.3d 244 (2008). For a change of custody, the trial court must first determine that a material change in circumstances has occurred since the last order

of custody; if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the children. *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004).

Appellant's first point on appeal is that the circuit court erred in denying his motion for change of custody. The circuit court found that a material change in circumstances did exist due to appellee's actions. However, the circuit court declined to change custody, citing an unwillingness to remove the child from her current support network. The circuit court properly considered the best interests of the child in making this decision. While appellee took some actions that could potentially cause harm to the child, there was evidence that appellee's actions were due more to her misguided view of appellant and flaws in her parenting ability than any deliberate intent. With this in mind, the circuit court took steps, including the contempt finding and strong wording in its order, that it felt would be sufficient to change appellee's behavior. Given the amount of upheaval that would occur in the child's life were custody changed to appellant, we cannot say that we believe the court definitely made a mistake in its decision. We affirm the decision of the circuit court on this point. However, we wish to stress to appellee that we are deeply concerned by the behavior she and her family have exhibited thus far, which has bordered on patently absurd at times. The disturbing actions undertaken by appellee and her family made it a difficult decision for us to affirm the order of the circuit court continuing custody of the child with appellee.

Appellant's second point on appeal is that the circuit court erred in denying his motion for new trial, motion for contempt, and motion for immediate change of custody filed after the hearing. Appellant has not properly appealed from the order denying those motions. The only notice of appeal contained in the record states that it is an appeal from the order entered on May 9, 2008. The order denying the posthearing motions, which was filed on July 2, 2008, is not listed in the notice of appeal. A notice of appeal must state the order appealed from with specificity, and orders not mentioned in the notice of appeal are not properly before the appellate court. *Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 209 S.W.3d 393 (2005). Because the July 2, 2008 order is not mentioned in the notice of appeal, we do not have jurisdiction to consider that order and, therefore, we will not address the merits of appellant's second point on appeal.

Affirmed.

ROBBINS and HENRY, JJ., agree.

Tripcony Law Firm, P.A., by: *Heather M. May* and *Gary L. Sullivan*, for appellant.

Choate Law Firm, PLLC, by: *Penny Collins Choate* and *Tasha Terry*, for appellee.