

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 09-130

CHRIS PECK

APPELLANT

V.

WENDY PECK (EGERDAHL)

APPELLEE

Opinion Delivered November 4, 2009

APPEAL FROM THE GRANT
COUNTY CIRCUIT COURT
[NO. DR-04-124-1]

HONORABLE CHRIS E WILLIAMS,
JUDGE

REVERSED

M. MICHAEL KINARD, Judge

Appellant, Chris Peck, appeals from the circuit court's denial of his motion for permanent change of custody of his minor daughter. Appellant argues that the circuit court erred in continuing primary physical custody of the child, who was five years old at the time of the hearing on appellant's motion, with appellee because her current husband is a registered sex offender. We reverse the decision of the circuit court.

The parties married in October 1998 and divorced in September 2004. Pursuant to the divorce decree, the parties were granted joint custody of the child by agreement and appellee was granted sole physical custody of the child. On April 2, 2008, appellant filed a petition for emergency and permanent change of custody. The circuit court entered a temporary order finding that no emergency existed, but stating that appellee's husband, Dean



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Egerdahl, was not to be left alone with the minor child under any circumstances. The order also appointed a guardian ad litem for the child.

On October 2, 2008, the circuit court held a hearing on appellant's motion for change of custody. Egerdahl testified that he and appellee married in 2005. He testified that he was charged with the rape of his daughter, who was four years old at the time, while living in Saline County. He pled guilty to a charge of sexual abuse in the first degree in January 1996 and received probation. He was initially classified as a Level I offender and was not required to register. He testified that after he married appellee and moved in with her, the system had two different addresses for him, which was considered a violation that raised him to Level II, requiring him to register. He has to register for two-and-a-half more years, then will no longer be required to register. He currently has custody of the daughter he pled guilty to abusing. In addition to the parties' minor child and Egerdahl's daughter, appellee and Egerdahl have two children together who also reside in the home. Egerdahl stated that before the entry of the temporary order, he hardly spent any time at all alone with his stepdaughter. He denied any inappropriate behavior toward his stepdaughter.

Appellant testified that he first learned of Egerdahl's status as a sex offender in March 2008 and immediately moved for custody. He testified that appellee is a good mother. He stated that the only reason he moved for custody was Egerdahl's status as a sex offender. Appellant has remarried, and his current wife has two children who live with them. Appellant works forty hours a week with what he called a flexible schedule. He admitted that appellee



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told him that Egerdahl had gotten into trouble in the past, but denied that she ever told him that Egerdahl abused his daughter. Appellant admitted that his child was happy, healthy, and thriving in appellee's care. Appellant also admitted that there were no allegations that Egerdahl had done anything to harm appellant's child.

Appellant's mother, Terri Peck, testified that appellant has an active role in the child's life. She also stated that appellant is a good father who does everything he can for his child. Ms. Peck stated that she often picks up the child from appellee's home to take her to church and different activities. She admitted that she had never seen appellee do anything harmful to the child other than allowing Egerdahl to live in the home.

Appellee testified that the child has contact with both of her grandmothers every day. Appellee stated that, to her knowledge, there had not been any problem with Egerdahl in the home. She also stated that she told appellant about Egerdahl's offense shortly after she was made aware of it. Appellee testified that there had been no question regarding her parenting abilities. She stated that Egerdahl had changed dramatically from who he was thirteen years earlier. Appellee testified that, prior to the temporary order, her daughter had only been alone with Egerdahl on three occasions for short periods of time. Appellee agreed that, if the court ordered that the child not be left alone with Egerdahl, she would comply with the court order. Appellee admitted that Egerdahl's status could cause some problems for her child with other children and parents as she gets older.



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Appellee's mother testified that she is very close with her granddaughter. She stated that appellee is a good mother. She also denied ever seeing Egerdahl do anything inappropriate with any of the children and stated that the child had never told her of Egerdahl doing anything inappropriate.

On October 24, 2008, the circuit court entered an order finding that a material change in circumstances did exist. The court ordered that the parties would share joint custody of the child and that the child would continue to reside with appellee. Egerdahl was forbidden to be alone with the minor child at any time. This appeal followed.

In child-custody cases, we review the evidence *de novo*, but we do not reverse the findings of the circuit 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 circuit 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).

The circuit court ordered that the parties were to share joint custody of the minor child, with appellee having primary physical custody of the child. Although joint custody or



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equally divided custody of minor children is permissible, *see* Arkansas Code Annotated section 9-13-101(b)(1)(A)(ii) (Repl. 2008), it is not favored in Arkansas. *See Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). The mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of joint custody. *Id.* When the parties have fallen into such discord that they are unable to cooperate in sharing the physical care of the children, this constitutes a material change in circumstances affecting the children's best interests. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001).

Because the presence of a sex offender in appellee's home has created a situation in which the parties can no longer agree who should have primary physical custody of the child, it was error for the circuit court to continue the joint custody arrangement. Furthermore, the circuit court's award of primary physical custody to appellee is clearly against the preponderance of the evidence. The legislature has created a rebuttable presumption that it is not in the best interest of a child to be placed in the care and custody of a sex offender or to have unsupervised visitation with a sex offender. Ark. Code Ann. § 9-13-101(d)(2) (Repl. 2008). The presumption is not strictly applicable in this case because the circuit court did not technically place the child in the care or custody of Egerdahl, and the circuit court forbade unsupervised visitation between Egerdahl and the child. However, section 9-13-101(d)(2) does evince a legislative policy that is opposed to children living in the home of a sex offender.



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Under the circuit court's order, the child would be required to primarily reside in the same residence as a convicted sex offender whose prior victim was roughly the same age as the child when the abuse occurred. Although the circuit court was silent as to the fitness of appellant's home, our de novo review of the record does not reveal any issues with appellant's home. Given these circumstances, the circuit court's finding that it would be in the best interests of the child to place primary physical custody with appellee is clearly against the preponderance of the evidence. Because the circuit court erred in continuing joint custody in this case and the circuit court's finding that it would be in the best interests of the child to place primary physical custody with appellee is clearly against the preponderance of the evidence, we reverse the order of the circuit court and order that appellant be granted primary custody of the child. Appellee is to receive the circuit court's standard visitation, with the provision that Egerdahl not be allowed to be alone with the minor child at any time without another adult present.

Reversed.

PITTMAN and HENRY, JJ., agree.

Robinson, Zakrzewski & Achorn, P.A., by: *Luke Zakrzewski*, for appellant.

Brown Law Firm, by: *Rebecca Brown*, for appellee.