

# ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CA 08-1326

DOUGLAS RAY JONES

APPELLANT

V.

JENNIFER JONES

APPELLEE

**Opinion Delivered** SEPTEMBER 9, 2009

APPEAL FROM THE FAULKNER  
COUNTY CIRCUIT COURT  
[NO. DR2004-943]

HONORABLE MICHAEL A. MAGGIO,  
JUDGE

REVERSED AND REMANDED

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**JOHN B. ROBBINS, Judge**

This is a child custody case. Appellant Douglas Ray Jones and appellee Jennifer Jones (now Savoie) were married on July 4, 2002, and one child, Alexis, was born to the marriage on May 14, 2003. The parties divorced on May 5, 2005. The parties' property settlement agreement, which was incorporated into the divorce decree, provided that the parties share joint custody of the child, with custody alternating on a week-by-week basis. The agreement further provided that Alexis was to be cared for by Douglas's mother when the parties were at work or otherwise unable to care for the child. Upon Alexis reaching school age, the parties were to mutually agree upon a school. Neither party was ordered to pay child support.

On August 17, 2007, Jennifer filed a petition for modification of the divorce decree, wherein she alleged that custody should change on the basis that Alexis will soon reach

school age. Jennifer asserted that it was in the best interest of the child that she be given full custody, and that Douglas should be awarded visitation and ordered to pay child support. Douglas filed a response and counter-motion for a change of custody, asserting the following changes in circumstances: Douglas and his family have been the primary caregivers, the parties can no longer make joint decisions relating to the child, the parties live in different counties making it impossible to continue joint custody now that the child has reached school age, and Jennifer has neglected the child's medical needs. Douglas alleged that it was in Alexis's best interest to be placed in his full custody, subject to Jennifer's reasonable visitation, and that Jennifer should be ordered to pay child support.

After a hearing, the trial court awarded "primary joint custody" to Jennifer, with Douglas to receive "standard blue book visitation," and the trial court ordered that child support would be set according to Administrative Order Number 10. Douglas now appeals from the order changing custody, arguing that the trial court erred in finding that Douglas failed to prove a material change in circumstances; erred in failing to apply that threshold burden to Jennifer; and abused its discretion when it found that it was in the child's best interest to "remain" with Jennifer. We agree with each of Douglas's arguments, and we reverse and remand.

Jennifer testified at the hearing and stated that she had three children and is pregnant with a fourth child. Her first child, Ashley, was born before the parties' marriage, and Jennifer never married Ashley's father. Alexis is Jennifer's second child. The third child, Savannah, was conceived while the parties' divorce was pending, and Jennifer later married

Savannah's father for a brief period before divorcing. Jennifer is currently married to Cody Savoie and is pregnant with his child.

Jennifer presently lives with Cody in Guy, and has custody of her other two children. She lives in a three-bedroom house that Cody is buying. Jennifer works in Quitman at a pawn shop, and she works regular business hours with Wednesdays off. Before marrying Cody, Jennifer had lived in a number of locations and held various jobs.

Jennifer indicated that the parties can no longer make joint decisions regarding Alexis, such as where she will attend kindergarten for the upcoming school year. Jennifer wants Alexis to attend school in Quitman, while Douglas wants her to go to school where he lives in Clinton. Jennifer stated, "whether I tried to work with Doug by abiding by the terms of the decree, I tried to talk to him, I tried to abide by them, but that's why we're here today is we can no longer agree upon anything." Jennifer indicated that she wants primary custody and wants Douglas to see Alexis every other weekend because joint custody is not working. Jennifer testified that Alexis gets along well with her sisters as well as Cody, and thought it was important for Alexis to be with her mother.

Jennifer's mother and father testified on her behalf. They both testified that Jennifer is a good mother and has a good relationship with her children.

Douglas testified that he lives in a house in Clinton, where he has lived for three or four years. He works as a jailor for the Van Buren County Sheriff's Office, and his shift is from 3 p.m. until 11 p.m. Douglas indicated that if he is awarded primary custody, he would

be willing to find a job where he could work daytime hours and have more time to spend with Alexis.

Douglas testified that he has a very good relationship with Alexis and that he has lots of family in the Clinton area. He further testified that Alexis has a very close relationship with his parents, and that his mother has cared for Alexis since she was a baby.

Douglas expressed concerns about Jennifer's lack of attention to the child's special health needs, and produced the testimony of a doctor who treated Alexis for bladder reflux and abscesses. Jennifer generally denied the alleged lack of attention to Alexis's needs. Douglas also produced testimony that on one occasion Jennifer was arrested for public intoxication, and while Jennifer acknowledged the incident, she stated that it was isolated and that she has never consumed alcohol in front of her children. Douglas also produced the testimony of a private investigator who claimed that Cody spent the night, with Alexis present, in Jennifer's home before Cody and Jennifer were married. Both Cody and Jennifer denied that allegation. Douglas also acknowledged poor judgment on his part when, sometime after the parties' divorce, he showed Jennifer a sex toy in the parking lot of her work place.

In the order now being appealed, the trial court made the following pertinent findings:

2. The Court finds that [Douglas] did raise lifestyle issues of [Jennifer], however, those issues were present before they were married, during the marriage, after their marriage and have continued until presently.
3. Douglas was well aware of the changes in housing, jobs, pregnancies and marital status, but never challenged the custody of Jennifer with regard to any of the previous changes and Douglas quietly acquiesced to Jennifer's lifestyle.

4. Douglas never argued that Jennifer was an unfit mother, just that her lifestyle was not good and that he is the more stable parent as evidenced by fewer job changes and his housing situation is stable.
5. The Court finds that, while there are valid concerns with the mother's choices, Douglas did fail to carry his burden to prove a material change in circumstances and therefore the Court cannot grant his countermotion for a change in custody.
6. Regarding the issue of Jennifer's Motion to Modify Decree, it is clear that the child has a close relationship with both parents, as well as the grandparents and it is the hope of the Court that the child be allowed and encouraged to continue in that relationship with all the parties.
7. Jennifer has carried the burden to show that the best interest of the minor child is to remain with her.
8. Jennifer is hereby awarded primary joint custody with Douglas to receive standard blue book visitation.<sup>1</sup>

In this appeal, Douglas first argues that the trial court erred in failing to find that he met his burden to prove a material change of circumstances. 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. *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004). If that threshold requirement is met, the trial court must then determine who should have custody with the sole consideration being the best interest of the children. *Id.* In cases involving child custody, we will not reverse a trial court's findings of fact unless they are clearly erroneous. *Deluca v. Stapleton*, 79 Ark. App. 138, 84 S.W.3d 892 (2002).

We agree that the trial court clearly erred in finding that Douglas failed to establish a material change in circumstances. In making this finding, the trial court focused only on

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<sup>1</sup>We do not address the validity of setting visitation by reference to some publication identified only as the "standard blue book" with which the parties may not be familiar, but suggest that the better practice is for the court's order to set forth a visitation schedule with language that the parties should easily understand.

Jennifer's lifestyle issues, rather than what was alleged in Douglas's counter-motion and the evidence of material changes adduced at the hearing. We have held that joint custody of minor children is not favored in Arkansas, and that 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. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). When the parties have fallen into such discord that they are unable to cooperate in sharing the physical care of the child, this constitutes a material change of circumstances affecting the child's best interest. *Id.*

In the present case, both parties agreed at the hearing that they are no longer able to make joint decisions, and Jennifer testified that the hearing was necessary because "we can no longer agree upon anything." Significantly, Alexis has reached school age and the parties cannot agree whether she will attend school in Quitman or Clinton. Clearly, joint custody is no longer a viable option and the discord and lack of cooperation between the parties is itself a material change affecting the best interest of the child.

Douglas's next argument is that the trial court erred in failing to apply the threshold material-change burden to Jennifer before finding that primary custody to Jennifer was in the child's best interest. This argument is supported by the trial court's language in its order changing custody. In the order, the trial court found that Douglas failed to prove a material change in circumstances, and then went directly to the best-interest analysis in awarding custody to Jennifer. Thus, the trial court appears to have erroneously applied different burdens of proof to the parties.

Finally, Douglas takes issue with the trial court's finding that Jennifer "carried her burden to show that the best interest of the minor child is to *remain* with her" (emphasis added). Douglas correctly points out that because joint custody had previously been awarded, and Jennifer had never been awarded primary custody, it was an erroneous application of the facts to find that the child should *remain* with her. Douglas submits that the trial court erroneously gave a preference to the mother in its analysis, which is contrary to Ark. Code Ann. § 9-13-101(a)(1)(A)(i) (Repl. 2008), which provides that a custody award shall be made without regard to the sex of a parent but solely in accordance with the best interest of the child.

Because there was a material change of circumstances, the trial court should have engaged in a best-interest analysis in deciding primary custody of the child. While the trial court did ultimately engage in a best-interest analysis, it did so after applying different burdens to the parties and making no threshold decision that there had been a material change. Furthermore, the trial court may have given a preference to Jennifer in finding it in the best interest for Alexis to *remain* with her, when Jennifer did not have primary custody to begin with. In light of these errors, we reverse and remand to the trial court for a primary custody decision based on the best interest of the child, without giving any preference to either party, and being mindful of the fact that the trial court's prior order gave the parties joint custody.

Reversed and remanded.

GRUBER and BROWN, JJ., agree.