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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 09-598

	Opinion Delivered FEBRUARY 11, 2010
JUDY MOORE APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. E 2001-1780-4]
V.	HONORABLE MARY ANN GUNN, JUDGE
MARK MOORE APPELLEE	AFFIRMED

M. MICHAEL KINARD, Judge

The parties in this case are a divorced couple with one child born of the marriage, Z.M. Appellant Judy Moore argues on appeal that the trial court erred in finding that a change in Z.M.'s school calendar was not a material change in circumstances warranting a modification of visitation rights. We affirm the circuit court.

Appellant and appellee, Mark Moore, were divorced in August 2002, and the court awarded appellant custody of Z.M. and gave appellee visitation rights. After the divorce, with the court's permission, appellant relocated with Z.M. from Fayetteville, Arkansas, to Houston, Texas. A March 2003 "order for modification" provided for summertime visitation to appellee "beginning three days after school is out for summer break . . . and continuing until three days before school starts for the fall term," with the dates being "defined by the calendar of the school system where the plaintiff [appellant] resides."

Once Z.M. reached school age, appellant's time with Z.M. during the summer would be one week. Appellant was ordered to give the child's father two weeks' notice as to when she intended to exercise her visitation; if she failed to notify him, visitation was ordered to begin July 1 and end July 7. The court's thorough order, which there is no need to set out in detail here, allowed appellee visitation at least one weekend per month during the rest of the year, with much of the visitation taking place in Houston.

The parties exercised visitation under this order for several years. In the summer of 2007, appellee allowed appellant to come to Fayetteville to visit Z.M. during the weekdays for several days, but afterwards stated that he was no longer willing to allow these visits. On April 10, 2008, appellant filed a petition for modification requesting, among other things, that appellee's visitation be modified to recoup the days she lost with Z.M. in the summertime due to the change in the school calendar.[1] At the hearing on the petition, appellant testified that since Texas changed the public school calendar so that school could not begin prior to August 4 each year, there are now seven to fourteen "extra" days in the schools' summer break. According to an exhibit introduced by appellant, the change meant the number of days in the summer break went from seventy-four to eighty-eight, with the number falling to eighty-three the following year and eighty-two the year after that. She testified that the new calendar creates a seven-week period during which she did not get to see Z.M. Appellee testified regarding the close relationship between Z.M. and

[1] Appellee filed a counterpetition for modification, which is not at issue in this appeal.

his stepsiblings and between Z.M. and appellee's baby with his current wife. He further testified that even with the eight more days he gets with Z.M. in the summer due to the calendar change, he still has fewer days with him than he did prior to Z.M. starting school.

In an order filed February 5, 2009, the circuit court denied appellant's petition for modification of the summertime visitation schedule. In its ruling from the bench, the court acknowledged that "it is unusual for the court to order one week summer visitation" to the custodial parent. The court explained its reasons for doing so in this case by stating, "I determined . . . that there was a significant period of time during the year that Mr. Moore would not be able to be . . . a part of [Z.M.]'s life. And what I tried to do was . . . give him substantial quality time with [Z.M.] as best I could, and of course that fell to the summer months. So I'm not going to change that." The court also stated that the school calendar changed every year and suggested that the court was not going to revise summer visitation every single year.

Appellant argues on appeal that the trial court erred in finding that a change in Z.M.'s school calendar was not a material change in circumstances warranting modification of visitation rights. The applicable standard of review has been set forth as follows:

> In reviewing domestic-relations cases, this court considers the evidence *de novo*, but will not reverse the trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. It is well settled that the trial court maintains continuing jurisdiction over visitation and may modify or vacate such orders at any time on a change of circumstances or upon knowledge of facts not known at the time of the initial order. . . . While visitation is always modifiable, our courts require a more rigid standard for modification than for initial

> determinations in order to promote stability and continuity for the children, and to discourage repeated litigation of the same issues. The party seeking a change in visitation has the burden below to show a material change in circumstances warranting the change in visitation. The main consideration in making judicial determinations concerning visitation is the best interest of the child. Important factors to be considered in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. The fixing of visitation rights is a matter that lies within the sound discretion of the trial court.

Hass v. Hass, 80 Ark. App. 408, 410–11, 97 S.W.3d 424, 426 (2003) (internal citations omitted). Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interests. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002).

Appellant cites *Welch v. Welch*, 5 Ark. App. 289, 635 S.W.2d 303 (1982), and the dissent in *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003), in support of her argument that it is in Z.M.'s best interest to continue spending the same amount of time with each parent as he had been before the change in the school calendar. However, we do not reach the best-interest argument because appellant's initial hurdle of showing a material change in circumstances was not met in this case. While the circuit court did not make an explicit finding that there was no material change in circumstances, the record does support such a finding.

After reviewing this case under the proper standards, we are not convinced that the trial court erred in denying appellant's petition for modification of the summertime

visitation schedule. The change in the school calendar was simply not a material change warranting a modification of the existing visitation schedule. First, only about one week of visitation is at issue. Second, the reason for requiring a more rigid standard for modification than for initial visitation and custody determinations is to promote stability for the child and to discourage repeated litigation of the same issues. Here, the trial court expressed concern about the prospect of the parties running back to court every time the school calendar changed. Such concern seems to us to be well founded.

In sum, the trial court carefully considered the petition and denied it, and we see no reason to reverse that decision.

Affirmed.

HART and HENRY, JJ., agree.