

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA09-907

MARK N. ERICKSON,

APPELLANT

V.

TINA K. ERICKSON,

APPELLEE

Opinion Delivered APRIL 7, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. DR2002-2100]

HONORABLE MACKIE M. PIERCE,
JUDGE

AFFIRMED

KAREN R. BAKER, Judge

On appeal, appellant Mark Erickson asserts that the trial court erred in its findings that there had been a substantial change in circumstances and that it was in the best interests of the parties' minor children that custody of them be vested in appellee Tina Erickson (now Scott). We find no error and affirm.

The parties were divorced in 2002, and Mr. Erickson was awarded primary custody of the parties' minor children. Although Ms. Erickson was awarded visitation every weekend, this schedule was not exercised fully. Both parties remarried and divorced between 2002 and 2008. In the spring of 2008, Mr. Erickson asked Ms. Erickson if she would take the children for a few months. His stated reasons for his request were that the time would allow him the opportunity to regroup and get back on his feet from his divorce while simultaneously

allowing the children to build a stronger relationship with their mother. After negotiations, the children went to live with their mother.

In October 2008, Mr. Erickson purchased a house in Cabot, in the same school district and zone as the children resided with Ms. Erickson. Mr. Erickson subsequently removed the children from their mother's care to resume their permanent residence with him. An emergency hearing was held in December 2009. At the temporary hearing, the court stated that Mr. Erickson was to be commended for the job he had done as a parent; however, the court awarded temporary custody to Ms. Erickson citing the fact that they had been living with her immediately before the father's removal of the children from her care. After the full trial of the matter, the trial court changed permanent custody to Ms. Erickson on the conditions that she no longer live without the benefit of marriage with the man with whom she had been living, and that she obtain a more appropriate residence.

Mr. Erickson sets forth a litany of reasons as to why the children's mother should not have been awarded custody. These reasons include the following: She had lived with her boyfriend for three years, who was still married to another and had only filed for a divorce in September 2008; she had been married and divorced three times by her admission; she had a son from a prior marriage whom she sent to live with his father about a year after marrying Mr. Erickson and with whom she no longer had a relationship nor paid support; and she had been held in contempt twice for nonpayment of child support prior to the change of custody. Mr. Erickson also stated that while the older child expressed an interest in living with his

mother to get to know her better, that the child had no problem with living with his father, and the younger child expressed a desire to live with his father.

At trial, Ms. Erickson stated that there was never any discussion that the custody arrangement was temporary. In order to meet the demands as the custodial parent, she had reduced her work hours by changing her position as an assistant manager to a shift manager to accommodate caring for the children. The change in employment resulted in reduced income, loss of health insurance, life insurance, and a 401K. She described her and her fiancé's plans to marry and purchase a home with larger space to allow the children more privacy. She also described Mr. Erickson's lack of cooperation in addressing the children's needs and the younger child's behavior disruptions that were being addressed by consistent structure. Improvements in the child's behavior in the home and at school were discussed.

The therapist testified that the older child was very sensitive to disparaging comments about his parents and referenced his father's speaking negatively about his mother. The therapist explained that the child experienced his father's comments as being hurtful to him. She specifically stated that the child did not say anything about his mother making hurtful comments regarding his father. The therapist also discussed the older son's feeling that there is an alienation in his father's home. She further expressed her opinion that the children were able to adapt but that the younger would have an adjustment whichever way the custody was awarded.

The trial court found that a material change of circumstances justified the court

considering the best interests of the children and found that it was in their best interests to remain together and with their mother. Appellant does not argue that his decision to send the children to live with their mother, or that their subsequent living with her for months prior to his removing them from her care, did not constitute a material change of circumstances. Instead, he focuses upon the trial court's favorable remarks regarding appellant and the trial court's failure to give specific findings of fact and law regarding its determination that a material change had occurred that warranted a finding that it was in the children's best interests to transfer custody from their father to their mother.

In reviewing child-custody cases, we consider 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. *Middleton v. Middleton*, 83 Ark. App. 7, 113 S.W.3d 625 (2003). Although there is evidence to support it, a finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* 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 interest. *Id.*

Custody should not be changed unless conditions have altered since the most recent custody order was rendered, or material facts existed at the time of the last order but which were unknown to the court, and then only for the welfare of the child. *Gerot v. Gerot*, 76 Ark. App. 138, 61 S.W.3d 890 (2001). The court must first determine that a material change in

circumstances has occurred since the last order of custody; if that threshold is met, the court must then determine who should have custody with the sole consideration being the best interest of the child. *Id.* Our courts require a more rigid standard for custody modification than for initial custody determinations so as to promote stability and continuity for the child and to discourage repeated litigation of the same issues. We also note that, while a child's preference is not binding, it is certainly a factor to be considered by the trial court in making a custody decision. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999).

Appellant did not request specific findings pursuant to Rule 52(a) of the Arkansas Rules of Civil Procedure and the trial court is not required to do so absent a party's specific request. Rule 52(a) of the Arkansas Rules of Civil Procedure affords a litigant a right to *request* specific findings of the trial court. However, failure to make a timely request for separate findings constitutes a waiver of that right. *Davis v. Sheriff*, 2009 Ark. App. 347, 308 S.W.3d 169; *see also Legate v. Passmore*, 268 Ark. 1161, 1162, 599 S.W.2d 151, 152 (Ark. App. 1980) (holding that parties could not construe trial court's statement to be exclusive of other legal conclusions it might have reached in determining the verdict and judgment).

In reviewing the record, sufficient evidence supports the trial court's findings, which are also not inconsistent with his favorable comments regarding Mr. Erickson's previous care and custody of the children. Mr. Erickson voluntarily transferred custody of the children to Ms. Erickson who changed her employment, enrolled the children in school, and accepted financial hardship to do so. Evidence of alienation was present. In addition, the children were

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doing well, and the behavior of the younger child was improving in the full-time care and custody of their mother. Under these circumstances, we do not have a firm and definite conviction that a mistake has been made. Accordingly, we affirm.

GLADWIN and MARSHALL, JJ., agree.