

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA10-946

LEESHA RENAE CHAFFIN
APPELLANT

V.

JOSHUA KANE CHAFFIN
APPELLEE

Opinion Delivered APRIL 20, 2011

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NO. DR-06-391-2]

HONORABLE MICHAEL MEDLOCK,
JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

The parties divorced in 2007. Their divorce decree stated that they would have joint custody of their daughter, K.C., with Leesha being the primary custodian. In March 2009, Joshua moved to change custody of K.C. to him. After a hearing, the circuit court granted Joshua’s motion. Leesha appeals. We affirm.

In child-custody cases, the primary consideration is the welfare and best interest of the child. *Hatfield v. Miller*, 2009 Ark. App. 832, at 7. All other considerations are secondary. *Id.* “In determining whether a change in custody is warranted, the trial judge must first decide whether there has been a material change in circumstances since the most recent custody order.” *Doss v. Miller*, 2010 Ark. App. 95, at 8. The burden is on the moving party to show a material change in circumstances. *Id.* The standards for a custody modification are more stringent than those for an initial custody determination. *Hatfield*, 2009 Ark. App. 832, at 7.

This promotes stability and continuity in the child's life and discourages repeated litigation of the same issues. *Id.*

On appeal, we consider the evidence *de novo*. *Doss*, 2010 Ark. App. 95, at 7. But we do not reverse unless the circuit court's findings of fact are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that the circuit court made a mistake. *Id.* at 8. We give due deference to the circuit court's superior position to judge the credibility of the witnesses. *Hatfield*, 2009 Ark. App. 832, at 8. This deference is important in child custody cases "as a heavier burden is placed on the trial judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the child[]." *Id.*

Material Change in Circumstances

The circuit court made no specific findings regarding this required element. But when "the trial court fails to make findings of fact on material change of circumstances, we are permitted on *de novo* review to conclude that there was evidence from which the trial court could have found such changed circumstances." *Maley v. Cauley*, 2010 Ark. App. 850, at 5.

At the change-of-custody hearing, Joshua's chief complaint was that his father and stepmother, Donald and Patricia Chaffin, were raising K.C. rather than Leesha. Joshua and Donald are estranged. Joshua testified that K.C. lived with Donald and Patricia as far as he knew. And Joshua's grandmother (Donald's mother), Nina Garland, who often picked up K.C. when it was Joshua's turn for visitation, said that she almost always picked up K.C. from

Donald and Patricia's house rather than Leesha's. Joshua's mother, Deborah Ann Preston, testified that Leesha told her that K.C. lives with Donald and Patricia and that Leesha only sees K.C. one or two days a week. Leesha disputed this testimony.

According to Leesha, K.C. spends the night with her three to four nights a week and spends three to four nights a week at Patricia and Donald's house. Patricia said, however, that K.C. only spends two or three nights a week at she and Donald's house. But Donald said it was more often, stating that K.C. would spend four or five nights with Patricia and him during weeks when Joshua did not have weekend visitation. Donald added that the only time he and Patricia would take care of K.C., however, was when Leesha was working or at school. When asked whether it was fair to say that K.C. spent more time at his and Patricia's house than Leesha's house during weeks when Joshua did not have weekend visitation, Donald responded, "Yes."

Joshua also complained that his visitation was limited with K.C. and that he wished he could see her more often. Joshua testified that Leesha said that she thinks that he should see K.C. more often, but that Donald does not want that. Joshua's mother testified that Leesha said that she would like Joshua to spend more time with K.C., but only if she and Joshua were back together. Leesha disputed that she had ever said that. Joshua said that he is frequently denied his weekly Wednesday-evening visitation and has only had two Wednesday visitations in the last three years. Leesha blamed Joshua's work schedule for his inability to regularly exercise his Wednesday visitation. Joshua conceded that his work

schedule was an obstacle, but also stated that he was routinely denied extra visitation on Saturday and Sunday when he was off work. Joshua also said that he was regularly excluded from K.C.'s school activities and was not placed on the list of people who can pick up K.C. from school. However, Leesha testified that Joshua never asked to be on the school pick-up list and that Joshua has never been to one of K.C.'s parent/teacher conferences.

Nina Garland testified that when she goes to pick up K.C. from Donald and Patricia's house, Donald and Patricia will not let K.C. leave until K.C. repeats the things Donald and Patricia have told her about Garland. These things include that Garland hates "baby Jesus," Catholics, and Donald. Garland testified that she has to explain to K.C. that those things are not true. However, Patricia testified that she has never denied Joshua visitation or prevented Garland from picking up K.C.

Leesha points to Joshua's testimony that he has been picking up K.C. from Donald and Patricia's house "since the first court date." She argues that because K.C. has been spending a substantial amount of time at Donald and Patricia's house since before the entry of the first custody order (or at least since the entry of the amended custody order), Joshua cannot raise this issue now. It is unclear what Joshua meant by "since the first court date." But even so, a circuit court can modify a custody arrangement "when there is a showing of facts affecting the best interest of the child that were either not presented to the circuit court or were not known by the circuit court at the time the original custody order was entered." *Hatfield*, 2009 Ark. App. 832, at 7. The record does not show that the circuit court was ever

made aware, prior to the hearing on Joshua's change-of-custody motion, of the substantial amount of time K.C. was spending at Donald and Patricia's house. Thus, the circuit court could have taken this evidence into consideration when deciding Joshua's change-of-custody petition.

Besides the testimony about K.C. spending a substantial amount of time in Donald and Patricia's care, there was other evidence showing a material change of circumstances. Joshua testified that he had been denied his regular visitation and extra visitation with K.C. He also said Leesha told him that Donald did not want Joshua to have more visitation with K.C. There was also testimony that Donald and Patricia are attempting to poison K.C.'s mind against Garland, K.C.'s great-grandmother and primary babysitter when K.C. is in Joshua's care. And Joshua said that he is not allowed to pick up K.C. from school because neither Leesha nor Donald and Patricia have added him to the school's list. Joshua also testified about being excluded from K.C.'s school activities. When asked whether she had informed Joshua about K.C.'s upcoming field trip, Leesha responded, "No. He doesn't go to the school to ask about anything." In sum, the evidence supports a finding of a material change in circumstances. *See, e.g., Sharp v. Keeler*, 99 Ark. App. 42, 54–56, 256 S.W.3d 528, 536–38 (2007).

K.C.'s Best Interest

In addition to the evidence and testimony discussed above, Joshua testified that he has his own place, that he lives there alone, that it is clean, that he can cook and prepare food for K.C., and that he can take care of K.C.'s clothes and make sure she is clean and dressed.

Joshua also testified that his work schedule would allow him to drop off and pick up K.C. from school. Joshua said that he has worked at the same job for nine years and could change his work schedule to better accommodate caring for K.C. on a full-time basis. Joshua admitted that he would have to use a babysitter to watch K.C. while he is at work. Leesha, on the other hand, testified that she works at Olive Garden, that she also attends school, and that her weekly schedule fluctuates, which is why she uses Donald and Patricia for babysitting. Based on our *de novo* review of the record and giving due deference to the circuit court's credibility and weight-of-evidence determinations, we see no clear error in finding that changing custody of K.C. from Leesha to Joshua was in K.C.'s best interest. *See, e.g., Lewellyn v. Lewellyn*, 351 Ark. 346, 358, 93 S.W.3d 681, 688 (2002).

Affirmed.

WYNNE and BROWN, JJ., agree.