Cite as 2019 Ark. App. 75

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-17-1030

JONATHAN GOODMAN APPELLANT V. MISTY GOODMAN APPELLEE	**Opinion Delivered:** February 6, 2019 APPEAL FROM THE UNION COUNTY CIRCUIT COURT [NO. 70DR-14-121] HONORABLE SPENCER G. SINGLETON, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

Appellant appeals from the circuit court's order denying his motion for change in custody and limiting his visitation with J.G., born 04/25/2001, and C.G., born 05/31/2005. On appeal, he argues that the circuit court abused its discretion (1) in denying C.G.'s clear desire to live with her father, absent a report or recommendation from the ad litem about why that desire should not be met; (2) in failing to require a report detailing why the ad litem's recommendation was anything other than the expressed intent of his client as required by Administrative Order No. 15; and (3) for withholding visitation as punishment for contempt. We affirm.

The parties were divorced by decree entered October 28, 2014. By agreement, the parties were awarded joint custody, with appellee being primary custodian of the minor children. The circuit court specifically found that contrary to appellee's assertion, there was "no credible evidence to show that the children's health or welfare would be jeopardized

by the [appellant] exercising unsupervised visitation." Appellant was awarded unsupervised, non-standard visitation due to the circuit court's finding that it was "not feasible to order visitation as per its standard guidelines" as it "seems unreasonable to expect these children to be required to endure a round trip from Union County, Arkansas, Arkansas, [sic] to Houston, Texas, every other weekend."

Appellee filed a petition for modification of decree on June 8, 2015, alleging that appellant refused to provide the children's whereabouts and contact information to appellee during their visits with appellant. In her prayer for relief, appellee asked the circuit court to modify appellant's summer visitation. Appellant responded, denying appellee's assertions and seeking denial of her petition on June 9, 2015. On the same date, appellant filed a counterclaim, a motion for contempt, a motion to change child support, and spousal support and motion to modify summer visitation. In part pertinent to this appeal, appellant asserted that appellee "on numerous occasions refused to travel the distance of one half between, Houston, Texas and El Dorado, Arkansas to exchange the children" and was not allowing visitation as ordered. He also sought modification of the dates of his summer visitation to prevent conflict with the children's first week of school. Appellee answered, denying appellant's assertions and seeking denial of appellant's counterclaim and motions on July 7, 2015.

On June 28, 2016, appellee filed a petition for contempt of court alleging in pertinent part that appellant had failed to return the minor children to her custody on June 26, 2016. Appellee filed a petition for immediate custody on July 5, 2016, asserting that appellant had yet to return the children to her custody. Appellant answered appellee's petition for

immediate custody on July 7, 2016, admitting that he had not yet returned the kids, but averring that he had failed to do so because of his intent to file a petition to change custody, which had been filed at the time of the filing of his answer to appellee's petition. He answered appellee's contempt petition on the same date, admitting that he had not returned the children, but denying that sanctions were appropriate because he had filed a petition to change custody.

In appellant's July 7, 2016 motion for change of custody, he asserted that there had been a change in circumstances based on

> belief by [appellant] that the parties' minor children, while living with [appellee] do not have adequate food in the home of [appellee], that [appellee] does not focus on the care of the children, neglects the children and shows favoritism to children other than the children in the case at bar and that there is in the home of [appellee] a child who presents a risk to the other children, in that another half sibling in the home of [appellee] has recently been engaged in criminal activity, and that there is living in the home of [appellee], with [appellee]'s oldest child (a child of a previous relationship) a girlfriend who is not related to [appellee] by blood or marriage.

Attached was an affidavit from J.G. stating that he "earnestly desire[d]" to continue to be allowed to live with his father with visitation to his mother.[1]

Also attached to the motion was an affidavit from C.G. stating her "sincere desire and belief" to have custody changed to appellant. She stated therein the following reasons for her desire for a change in custody: (1) she "[did] not feel loved" in appellee's home; (2) appellee "spends more time" with others than with her and J.G., after which she goes to bed; (3) appellee "never has any money with which to provide for [C.G.'s] needs"; (4) C.G. "[does] not feel safe" around her half-brother who had "on multiple occasions gotten

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[1]By the time of the hearing, J.G. no longer wanted custody changed to appellant and desired to remain in the custody of appellee.

physically violent with her" and appellee says "there is nothing she can do about it"; and (5) her maternal grandmother is "abusive toward [her] and [J.G.] verbally[,]" telling them they are "bad kids" and "useless, worthless and that [they] don't love [appellee] if [they] love dad." Appellee answered the motion on July 11, 2016, denying all material allegations therein and asserting that (1) appellant had come before the court with unclean hands, (2) he was only seeking custody to avoid payment of child support; (3) she had always been the children's primary caregiver; and (4) appellant had been physically abusive to her and the children during the marriage.

A hearing in the matter was held on July 13, 2016. On July 14, 2016, the circuit court filed a letter, which was virtually identical to its order entered on August 8, 2016. The circuit court found that appellant had remedied "most of the issues" raised by appellee in her motion since the time of its filing; however, it did order appellant to provide appellee with the whereabouts and contact information for the children when in his custody. While it modified appellant's visitation to accommodate the start of the El Dorado School District school year, it disallowed appellant to exercise his second period of summer visitation for the summer of 2016—unless agreed to by the parties—due to appellant's earlier failure to return the children to appellee's custody for a period of three weeks. It deferred sanctions for appellant's contempt in failing to return the children "pending final resolution of the issues remaining before [the circuit court] related to the custody of the children."

On April 18, 2017, appellee filed a petition for ex parte relief and for citation for contempt of court against appellant. She asserted therein that appellant failed to return the children to her custody at a visitation exchange on April 16, 2017, and instead, returned to

his home in Texas with the children. She noted that the children had missed school and that J.G. had missed standardized testing as a result of appellant's actions. On April 19, 2017, the circuit court entered an order granting ex parte relief in which it ordered appellant to return the children to appellee's custody immediately and ordered law enforcement agencies in Texas to assist in immediately returning the children to appellee, noting that such agencies should enforce provisions of the October 24, 2014 divorce decree.

A hearing was held on June 27, 2017. In pertinent part, the following persons testified: C.G.; J.G.; Ashtyn Lewis, former girlfriend of appellee's oldest son; appellant; Danielle Culver Goodman, current wife of appellant; appellee; Sue Giles, mother of appellee; and Jennifer Eley, counselor for J.G. The circuit court entered an order on June 30, 2017, which stated the following in pertinent, non-duplicative part:

> 7. On Sunday, April 16, 2017, the parties met in Carthage, Texas, for [appellant] to return the children from their Easter visitation. At that time, a dispute arose between the parties. Part of the dispute was captured on video by [appellee] and all persons present were aware that she was recording the encounter. By the conclusion of the encounter, police officers had responded. Officers permitted the children to decide who they wished to be with, and when the children chose the [appellant], the [appellee] returned to Arkansas and sought an Emergency Ex Parte Order from this Court. This Court granted the Ex Parte relief and directed that the children be returned immediately.
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> 8. At the present hearing, the Court took testimony from both children, both parties, Judy Bailey, Ashton [sic] Lewis, Danielle Goodman, Sue Giles, and Jennifer Eley. The Court also admitted into evidence multiple exhibits including numerous text messages and the video of the April 2017 exchange.
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> 9. Based on the testimony presented in Court and the evidence admitted in this matter, the Court denies [appellant]'s Motion for Change of Custody. The Court does not find that there has been a material change in the [appellee]'s circumstances that would warrant a change of custody. Last year, both minors expressed a desire to move in with the [appellant], however at the hearing, only C.N.G. continued to express that desire. While the Court is bothered by the children's academic performance, including their school attendance,

> the Court notes that [appellee] has taken steps to address these concerns including locating tutoring services for the children. Additionally, the [appellee], without requirement of the Court, enrolled the family into family counseling services. [Appellee] is encouraged to continue both tutoring and family counseling. The balance of the remaining claims of changed circumstances are either not credible or do not rise to the level of a material change in circumstances. Furthermore, even if there was a material change of circumstance, the Court would not find it in the best interests of the minors to change custody at this time.
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> 10. The Court does find that the [appellant] is in willful violation of this Court's orders and directions. After being held in contempt of court for not returning the children in the summer of 2016, [appellant] again willfully refused to return the children in April of this year. As shown on the video, [appellant] and his wife repeatedly told the children that they could decide whether to go with the [appellee]. [Appellant] and his wife spoke to [appellee] in a manner that was disgraceful and permitted and encouraged C.N.G. to do the same. Evidence admitted in Court shows that [appellant]—in the presence of the children and in communications with the children—has continued to demean [appellee] and to accuse [appellee] of only fighting for custody of the children in order for her to continue receiving child support. The Court also finds that [appellant] has manipulated his children into expressing desires to change custody and into fabricating grounds for such a change. This Court again holds [appellant] in Contempt of Court for his actions.
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> 11. Accordingly, it is appropriate in this situation to restrict the amount of visitation [appellant] has with the children.

The biggest change to visitation was in summer visitation. Instead of having the children for three weeks at the beginning of the summer break in addition to three weeks at the close of summer break, appellant's summer visitation was reduced to one week at the beginning and one week at the end of the summer break. This timely appeal followed.

Child-visitation cases are reviewed de novo on the record and will not be overturned unless clearly erroneous.[2] When the question of whether the circuit court's findings are

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[2]*Johnson v. Cheatham*, 2014 Ark. App. 297, at 6, 435 S.W.3d 515, 518 (citing *Stehle v. Zimmerebner*, 375 Ark. 446, 291 S.W.3d 573 (2009)).

clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interest.[3]

With regard to custody and visitation, the primary consideration is the welfare and best interest of the children involved; all other considerations are secondary.[4] A party seeking a change in visitation has the burden to demonstrate a material change in circumstances that warrants a change.[5] Fixing visitation rights is a matter that lies within the sound discretion of the circuit court.[6] Because a circuit court maintains continuing jurisdiction over visitation, it may modify or vacate a prior visitation order when it becomes aware of a material change in circumstances since the previous order.[7]

Appellant's first argument on appeal is that the circuit court abused its discretion in denying C.G.'s clear desire to live with her father, absent a report or recommendation from the ad litem, about why that desire should not be met. His argument is essentially that C.G.'s preference to stay with him should have been sufficient to warrant a change in custody.

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[3]*Chester v. Pilcher*, 2013 Ark. App. 571, at 7, 430 S.W.3d 130, 134 (citing *Brown v. Brown*, 2012 Ark. 89, at 6–7, 387 S.W.3d 159, 163 (quoting *Baber v. Baber*, 2011 Ark. 40, at 9–10, 378 S.W.3d 699, 705) (internal citations omitted)).

[4]*Bamburg v. Bamburg*, 2014 Ark. App. 269, at 8, 435 S.W.3d 6, 11 (citing *Baber*, 2011 Ark. 40, 378 S.W.3d 699; *Hicks v. Cook*, 103 Ark. App. 207, 288 S.W.3d 244 (2008)).

[5]*Id.* (citing *Baber*, 2011 Ark. 40, 378 S.W.3d 699).

[6]*Id.*

[7]*Hackney v. Hackney*, 2015 Ark. App. 114, at 5, 456 S.W.3d 394, 397 (quoting *Moix v. Moix*, 2013 Ark. 478, at 9, 430 S.W.3d 680, 685 (citing *Brown v. Brown*, 2012 Ark. 89, 387 S.W.3d 159)).

Arkansas Code Annotated section 9-13-101 provides that, in determining the best interest of the child, the court may consider the preferences of the child if the child is of sufficient age and capacity to reason, regardless of chronological age.[8] A child's preference about living with a particular parent is but one factor for the circuit court to consider.[9] The child's stated preference on custody is not binding on the circuit court.[10] The circuit court judge was in a better position than this court to judge the credibility of the witnesses, including appellant's minor daughter, C.G. This court cannot find that the circuit court abused its discretion in failing to modify custody based on C.G.'s stated preference.

To the extent that appellant's argument references the absence of a report of recommendation from the ad litem, he does not expound on said argument in his brief, failing to even mention it in his argument. This court may refuse to consider an argument when the appellant fails to cite any legal authority, and the failure to cite authority or make a convincing argument is sufficient reason for affirmance.[11]

Appellant's second argument on appeal is that the circuit court erred in failing to require a report detailing why the ad litem's recommendation was anything other than the

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[8]*Stacks v. Stacks*, 2009 Ark. App. 862, at 5, 377 S.W.3d 265, 269 (citing Ark. Code Ann. § 9-13-101(a)(1)(A)(ii)).

[9]*Neumann v. Smith*, 2016 Ark. App. 14, at 11, 480 S.W.3d 197, 204 (citing *Burr v. Burr*, 2015 Ark. App. 640, at 6–7, 476 S.W.3d 195, 198–99).

[10]*Id*. at 12, 480 S.W.3d at 204 (citing *Hart v. Hart*, 2013 Ark. App. 714, at 2).

[11]*Garcia v. Garcia*, 2018 Ark. App. 146, at 6, 544 S.W.3d 96, 100 (citing *Jewell v. Fletcher*, 2010 Ark. 195, at 24, 377 S.W.3d 176, 191; *Moody v. Moody*, 2017 Ark. App. 582, at 12, 533 S.W.3d 152, 160).

expressed intent of his client as required by Administrative Order No. 15. Appellant made no objections below regarding the ad litem's recommendation or a failure to provide a report. Our appellate courts have repeatedly held that appellants are precluded from raising arguments on appeal that were not first brought to the attention of the circuit court.[12] We will not do so because it is incumbent upon the parties to raise arguments initially to the circuit court in order to give that court an opportunity to consider them.[13] Accordingly, this argument is not preserved for this court's review.

Appellant's third argument is that the circuit court erred in withholding visitation as punishment for contempt. In support of this argument, appellant states that "[t]here is no pre-Order setting out what would be in the event of any willful violation." This is a misinterpretation of caselaw. The circuit court is not required to advise of the penal options that might occur if a party is found in contempt; the circuit court is only required to clearly express its terms for, commands to, and duties imposed on the parties.[14]

In the circuit court's October 28, 2014 divorce decree, it set out visitation in light of its finding that standard visitation would be "unreasonable." Visitation was then awarded

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[12]*Myers v. McCall*, 2009 Ark. App. 541, at 2, 334 S.W.3d 878, 880 (citing *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006)).

[13]*Stacks*, 2009 Ark. App. 362, at 4, 377 S.W.3d at 269 (citing *Advance Am. Servicing of Ark., Inc. v. McGinnis*, 375 Ark. 24, 33, 289 S.W.3d 37, 43 (2008) (citing *Seidenstricker Farms v. Doss*, 374 Ark. 123, 286 S.W.3d 142 (2008))).

[14]Appellant further argues, in error, that that circuit court "used future visitation as a penal method to punish the appellant and the Court's use of civil contempt, which is generally reserved for monetary damages, in this way was abuse of discretion." The circuit court did not state whether appellant was held in civil or criminal contempt.

to appellant, in part pertinent to this appeal, "every Easter weekend beginning Thursday, 5:00 p.m. until Sunday, 5:00 p.m." The children were scheduled to return to appellee on April 16, 2017, following appellant's Easter visitation in 2017. On April 18, 2017, when appellee filed her petition for ex parte relief and for citation of contempt of court, appellant had not yet returned the children. On April 19, 2017, the circuit court entered an order granting appellee ex parte relief and ordering that the children be "immediately returned" to appellee. The divorce decree clearly defined when visitation was to begin and end. It necessarily notified appellant of his duty to return the children to appellee at the appointed time. Appellant was clearly apprised by the divorce decree of the circuit court's terms for, commands to, and duties imposed on him.

We further note—as did the circuit court—that this was not the first time appellant failed to return the children to appellee in accordance with the divorce decree. Appellant had custody of the children for three weeks for his second term of summer visitation in June 2016. He was scheduled to return them to appellee on June 26, 2016. Appellee petitioned the circuit court for immediate custody on July 5, 2016. In the circuit court's August 8, 2016 order, the circuit court found that appellant "did, without cause, refuse to return the children to their mother in the state of Arkansas at the end of his scheduled summer visitation and that he is in willful contempt by reason of his failure to do so." Despite having already been found in contempt for failure to return the children in August of 2016, appellant chose, again, not to return the kids to appellee in April 2017. Appellant's argument that he is being punished for his "good faith reliance upon law enforcement officials" is inaccurate. This court does not deny that the circuit court found appellant to be in contempt

of court; however, it does not agree with appellant's characterization of the modification of his visitation as punishment stemming from his contempt citation.

Due to the circuit court's continuing jurisdiction on matters of visitation, and the circuit court's failure to rule on the same, still outstanding at the final hearing was appellee's June 8, 2015 request that the circuit court limit appellant's summer visitation. It is clear on the facts of this case that appellant had a past practice of abusing the circuit court's visitation schedule as set out in its divorce decree and that appellant not only speaks ill of appellee in front of his children, but he also encourages them to do the same. Though not expressly stated by the circuit court, such disregard for the orders of the court and disdain in his conduct for appellee—in the presence of the parties' children—sufficiently supports the necessary material-change-in-circumstances finding the circuit court had to have made before modifying visitation. Accordingly, this court holds that the circuit court did not limit appellant's visitation as punishment as he asserts but did so under its continuing authority to modify visitation, at the request of appellee. We affirm.

Affirmed.

GRUBER, C.J., and HIXSON, J., agree.

F. Mattison Thomas III, for appellant.

Stone & Sawyer, PLLC, by: *Phillip A. Stone*, for appellee.