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ARKANSAS COURT OF APPEALS

DIVISION I

No. CV-21-131

JANAE ROBINSON APPELLANT V. AARON ROBINSON APPELLEE	Opinion Delivered February 16, 2022 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04DR-16-1346] HONORABLE XOLLIE DUNCAN, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

Janae Robinson appeals the order of the Benton County Circuit Court changing custody of C.R.1 and C.R.2 to their father, appellee Aaron Robinson. She argues that the circuit court erred in changing custody of the minor children based on a finding of parental alienation. We affirm.

The parties were divorced by order of the Benton County Circuit Court on May 31, 2017. The parties were granted joint legal custody with appellant having primary custody of the minor children. Appellee was granted standard visitation and was ordered to pay child support. The parties were ordered to "confer and work together to resolve any disputes relating to their minor children"; to "make a good faith effort at seeking the input and advice of the other party prior to making any major life decisions for the minor children"; to "work together to ensure that each parent has a healthy and happy relationship

with the minor children"; and to "agree to a flexible visitation schedule that is in the best interest of the minor children." Appellant filed a petition for modification of the visitation schedule on June 22, 2018, in anticipation of her expected move with the children to Boise, Idaho. The circuit court held a hearing and subsequently filed an order on January 23, 2019, granting appellant's request. The order admonished the parties to "overshare the information they might have about the children." Appellee was granted FaceTime—or a suitable alternative—communication with the children twice a week. The parties were also ordered to "inform the Court Clerk of any change in their address and the name and address of their current employer" until the children reach majority or graduate from high school, whichever is later.

Appellee filed a petition for modification of custody and contempt on December 5, alleging that there had been a material change in circumstances, including: (a) alienation by appellant; (b) appellant's failure to provide a stable life for the children and to care for them appropriately; (c) appellant's violation of the decree by failing to seek appellee's input prior to making the major life decision of moving the children again in the middle of the semester; (d) appellant's failure to provide appellee with the address where the children live in Utah; (e) appellant's failure to respond to appellee's communication about his upcoming visit to Utah; (f) appellant's having the police serve him with a temporary order of protection at C.R.1's school, which contained untrue, inaccurate, and incomplete statements; (g) appellant's violation of the order by denying appellee his in-person and electronic visitation with the children; (h) appellant's lack of stability; and (i) the fact that C.R.1 has numerous unexcused absences due to tantrums. Appellant filed a response on February 21, 2020,

denying the material allegations of appellee's petition and seeking its dismissal. Appellant filed a counterpetition for contempt and modification of custody and child support. Appellant alleged that appellee had refused to participate in coparenting decisions and had engaged in conduct that made it difficult to coparent. Appellant also alleged a material change in circumstances: (a) appellee regularly and constantly sends harassing emails in an attempt to manipulate, frustrate, and inundate appellant; (b) appellee is unwilling to work through basic discussions with appellant in an effort to address issues regarding the minor children; (c) appellee refuses to allow appellant contact with his current wife, who is the children's primary caretaker during summer visitation which, in essence, prohibits appellant from having phone visitation with the children in a consistent manner; (d) appellee refuses to create an annual calendar and exchange it with appellant in an effort to streamline the visitation schedule and make communications more efficient; (e) appellee threatened to entered appellant's house without permission on several occasions; (f) appellee refuses to communicate in a productive manner with appellant and often waits to the last minute to attempt to schedule visitations with the children; and (g) appellee has refused to exercise all of his court-ordered visitation. Appellant also wanted child support modified based on her belief that appellee's income had increased. Appellee filed an answer on April 7, denying the material allegations of appellant's petition.

The circuit court held a hearing on the petitions on October 20. Matt Pabst testified that he was contacted by appellant in November 2019 to coordinate appellee's visit with the children because of the protection order in place at the time. He stated that he was able to successfully coordinate the pick up and drop off of the children.

Appellee testified that appellant did not contact him to let him know that she was looking for jobs outside of Idaho and that his first indication about her move to Utah was when he received a text from appellant on September 28, 2019, stating that she and the girls would be relocating to the Lehi area of Utah by October 14. He stated that when he responded with questions, appellant never gave a complete response to those questions. He said that he usually communicated with the girls through appellant's cell phone, but in October, appellant contacted him and told him that he could contact the girls through a land line or their tablet. He testified that video chatting through the tablet was "basically useless" because he could not see or hear the girls very well. He stated that when he voiced his concerns about the quality of the video chats to appellant, she told him that he could purchase a device. However, he said that he was skeptical to do so since an iPad given to them by his parents was broken while in appellant's possession. Appellee stated that he contacted appellant on October 13 to let her know that he planned to come to Utah and visit the girls from November 14 to 17. He said that appellant told him on October 16 that the stated weekend worked, and he purchased his plane ticket that same day. He stated that his attempts to contact appellant about any concerns were treated by her as harassment and a sign of his unwillingness to coparent with her. He testified that appellant would not provide him with her Utah address although he asked her for it several times. He said that appellant still has not personally given him the address. Appellee stated that in the days leading up to his visit to Utah, he could not reach the girls as he normally could, so he emailed appellant, but she did not respond. He said that he had been in contact with his girls the prior week, and they were excited to see him. He stated that he traveled to Utah

as planned and went to C.R.1's school, since he did not have the home address. He asked the school what time school would let out and left and returned at the stated time. As appellee was walking to the entrance, he noticed three police officers. One officer approached him and asked his name. When he responded, the officer stated that he was the person they were looking for and served him with the temporary order of protection. He said that the protection order only covered contact with appellant, not the girls. He stated that appellant was in the school's office and gave the officers a Post-it Note with Pabst's contact information on it. He said that he was able to arrange visitation with the girls though Pabst and that his two sisters picked the girls up at 6:00 p.m. at C.R.2's daycare. The hearing on the order was set for November 18, so appellee had to rearrange his schedule. Appellee stated that appellant accused him of trying to enter her home and of trying to kidnap the girls. The order of protection was dismissed. Appellee testified that he went to appellant's home in Idaho before the last hearing, but he denied trying to forcefully enter it. However, he said that he did ask appellant to see the girls' room, which appellant would not allow. He stated that appellant shortened his scheduled spring break with the girls to three days but subsequently canceled the visit altogether due to COVID-19. He said that she also denied his request to make up the lost time during summer break. He testified that during his summer visitation, he had to take the girls so that appellant could have them on the Fourth of July. He said that school attendance had been a problem for C.R.1 in Idaho, so he monitored it when they moved to Utah. He stated that from October 2019 to March 2020, C.R.1 had thirty-six absences and twenty-one tardies. He said that the only time he did not receive an attendance call from the school was one week in

February when appellant's cousin was babysitting the girls while appellant was on a business trip. Appellee stated that appellant did not follow the divorce decree or the modified order. He said that appellant did not even tell him the city they lived in, Saratoga Springs, which borders Lehi. He testified that he had exercised all his visitations that he has "been permitted to." He said that he feared appellant's behavior would continue if he was not granted custody.

On cross-examination, appellee stated that he does not have any concerns about C.R.1's grades, and he agreed that the girls are happy. He said that appellant should have informed him that she was looking for work outside of Idaho and not wait until she decided to accept a job to tell him that she was moving to Utah with the girls. He stated his belief that appellant arranges for others to meet him with the girls so that he could appear to be a "threat" to her. He denied ever hearing appellant tell him that she feared being in his presence. He said that he can call the girls and talk to them two or three times a week. He agreed that there were instances when appellant seemed to be trying to facilitate his relationship with the girls. He also agreed that he had not gone a full week without talking to the girls. Appellee admitted that when he had the girls, he only wanted appellant to call them while he was around. He stated that he really does not want appellant calling his wife, Martha, because he does not want appellant to make things up. He testified that he has visited the girls in their home states approximately five times (three times in Idaho and two times in Utah). He stated that both he and appellant could do better about communicating with each other.

On cross-examination by the ad litem, appellee stated that he and appellant met with a coparenting therapist after their divorce. He denied that he was uncooperative with the therapist. He said that appellant's fear of him did not begin until after she moved to Utah because she moved behind him in Arkansas and gave him her Idaho address.

On redirect, appellee stated that he did not believe appellant when she said C.R.1's tardiness is due to her throwing tantrums in the mornings and that when C.R.1 is late, she gets marked absent. He said that he wants stability for the girls and that they had not had stability in the last few years. He stated that he feels like he can build a closer connection with the girls when they are able to see each other while talking. He said that he was not aware of any agreement being proposed or made at coparenting therapy.

Appellant testified that C.R.1 has been absent and tardy frequently, but she was unsure of the exact number of times. She said that C.R.1 had been throwing tantrums since beginning first grade and that she initially informed appellee of this in August 2019. She said that if C.R.1 is more than fifteen minutes late, she is marked absent, and the teacher has to go into the system and change it. She stated the tantrums are the only reason for C.R.1's absences and tardies, except for one family day they took. Appellant testified that she tried a number of things to address C.R.1's issues and that C.R.1 now meets with the school counselor. She stated that C.R.1's tantrums are no longer an issue and that she now has perfect attendance in second grade. She admitted that she did not notify appellee of the steps she was taking to address C.R.1's issues. She agreed that she did not let appellee know that she was looking for a job outside of Idaho. She said that the company she initially went to Idaho to work for never opened. She found employment at a law firm but was laid off

after only a few months. She stated that she runs her own business but that it did not generate any income while she was in Idaho. She said that she did not see anything wrong with the quality of the video on the girl's tablet when they video chatted with her. Appellant stated that appellee could have made suggestions to her on how they should handle the tablet situation. She said that appellee is so focused on the court orders that he cannot be a productive coparent. She stated that she wanted to make sure she had a security system in place before she provided appellee with her Utah address because he has a history of violence against her. She also stated that she believed that she had thirty days before she was required to tell appellee where the girls lived. She denied knowing that she was moving into appellee's neighborhood in Arkansas and denied telling him that he could come over whenever he wanted to. She stated that appellee had intimidated her and tried to come into her home when she lived in Idaho. She said that she filed for the order of protection in Utah three days after appellee told her that he wanted to evaluate the girls' living condition. She testified that appellee was unable to talk to the girls in the days leading up to his visit because he called them after the girls' bedtime. She said that the girls could call appellee anytime they wanted to. She stated that she thought appellee would be served with the order of protection in Arkansas, not Utah. She said that when appellee contacted her after November 4, she thought he was doing so in violation of the protection order because she did not know that he had not been served. She sated that on November 14, she received a call from C.R.1's school about someone asking about the time C.R.1 gets out of school instead of checking her out, which caused the school some concern. She said that the school asked her if everything was okay and indicated that the school wanted to avoid a kidnapping

situation. She stated that she called the police to ask their advice because she did not know how she would get the girls back if appellee picked them up due to the protection order. She said that the police met her at C.R.1's school, and C.R.1 stayed in the principal's office the rest of the day. She testified that she showed the officers a picture of appellee and that they served appellee with the order when he arrived back at the school. She stated that the police advised her to use a third party to facilitate visitation between appellee and the girls and that she thought of Pabst. She said that she gave Pabst's information to the officers to pass to appellee. She admitted that at the hearing on November 18, she told the judge that appellee tried to kidnap the girls. She said that was her belief at the time and that she really did not know the meaning of the word "kidnap." However, she said that she now has a better understanding of the word and apologized for "using an inaccurate word." She agreed that appellee has custody of the girls and has a right to pick them up. She stated that the judge threw the petition out due to lack of jurisdiction. She denied knowing that the temporary order of protection would come with a no-contact order.

On cross-examination, appellant stated that appellee's allegations are not true. She said that the girls have adjusted well in Utah and that they are involved in extracurricular activities. She admitted that she and appellee do not coparent well and took responsibility for not knowing how to talk to him. She stated that she notified appellee within twenty-four hours of being offered the job in Utah. She said that she has tried to use two coparenting apps but that appellee would not refer to the one he downloaded, and he refused to download the second one. She testified that when she lived in Idaho, appellee dropped the girls off after a visit and asked to come into her home to see the girls' room, and she

would not let him. She said that appellee got agitated, began to pace the porch, made a fist, started breathing heavily, and got a look in his eyes that she had not seen since he abused her during their marriage. She stated that he did not leave until after she took her phone out to record him. She said that she had not been present for a pick up or drop off since that time. She stated that she would not even sleep in her house if appellee was in Idaho. She testified that she struggles with PTSD stemming from her abusive relationship with appellee. She said that she thought divorce would be sufficient, but the incident in Idaho showed her that it was not. She stated that she had a panic attack after she received the email form appellee stating that he wanted to evaluate the girls' living conditions. She said that she now has a security system in her home. She stated that she has started going back to counseling and that she had to undergo three sessions in order to face appellee at the hearing. She testified that she is conflicted because, on one hand, she wants the girls to have a good relationship with appellee, but on the other hand, she wants to ensure that she is safe from him. She said that she applied for the order of protection to protect her, but she did not include the girls in the petition. She stated that although appellee was served at C.R.1's school, C.R.1 did not know about anything. She testified that C.R.1's issues were behavioral, and they were able to be resolved through counseling sessions at the school. She said that appellee was aware that C.R.1 was in counseling. She stated that she did not see anything productive coming out of her informing appellee about all C.R.1's absences because he would have just threatened her with court. She said that the girls had a problem with keeping their tablet charged but there is now a charging station set up. She stated that it is discouraging that appellee threatens legal action so frequently. She said that she has

tried to include appellee in choosing medical and dental providers for the girls, but he is "not engaged in any of that." She also said that she offered to add Martha on the girls' information, but appellee would not respond. She testified that appellee would not allow her to contact the girls through Martha's phone when they were at his home. She said that spring break 2020 was canceled due to COVID-19 and that appellee was originally offered three days because that was the number of days reflected on the school calendar. She stated that she offered to make the week up during summer visitation, but appellee declined, saying that he wanted them for 2021 spring break. She said that she tried to create a calendar to eliminate the back and forth between her and appellee, but no calendar was ever put in place. She testified that appellee does not want to take the girls outside of his court-ordered visitation. She said that appellee has come to visit the girls four times and that one of those times was for his wedding. She stated that joint legal custody was not working because appellee uses it against her. She said that C.R.1 does not like to video chat. She stated that her goal is to be safe from appellee while at the same time allowing the girls to stay connected to him. She apologized to appellee about the no-contact part of the protection order.

On cross-examination by the ad litem, appellant stated that she did not have proof that C.R.1 has perfect attendance for second grade. She said that C.R.1 did not see a counselor in Idaho even though she had numerous tardies and absences. She stated that she was in counseling during and after the divorce, until she moved to Idaho. She denied wanting to have appellee served with the order of protection when he came to Utah. She said that she wanted the protection order so that appellee could not be near her or in her home. She said that she did not believe her problems with appellee had led to C.R.1's

anxiety. However, she stated that C.R.1 does not "feel safe" to express her feelings or show any outward emotions in front of appellee.

On redirect, appellant stated that she did not want to let appellee inside her "safe space" in Idaho when there was no third party present. She said that even with a third party present, she would still be uncomfortable allowing appellee into her home. She testified that she did not believe she has said anything around the girls to indicate that she is afraid of appellee. She stated that appellee weaponizes everything she says to him into "some kind of court thing." She said that spring-break visitation did not happen because she felt that it was "irresponsible to take children around the country during a global pandemic." She stated that she made an informed choice not to allow the girls to visit appellee during that time. However, she said that she told appellee he could come to Utah, but when she asked him about quarantining, he did not respond. She admitted that she would not allow appellee to pick the girls up for Christmas break at the airport in St. Louis when they arrived but instead made him meet someone with them later that day.

On recross, appellant stated that appellee has three tones: (1) the email or court tone, (2) the lovely tone when he thinks someone is listening, and (3) the awful or harsh tone when he does not think anyone is listening.

Appellee testified on rebuttal that appellant's recount of what happened in Idaho was "highly exaggerated." He said that in her petition for the order of protection, appellant failed to mention that he was at her home to drop the girls off and instead made it seem as if he had just showed up and demanded to be let in. He stated that when he asked to see the girls' room in Idaho, he was doing so at the urging of the Arkansas ad litem. He denied

having three tones. He testified that once appellant was served with notice for this hearing, she blocked his number from the land line, and although the girls were able to call him, he could not call them between January 2020 to mid-May, except for one weekend while the children had a babysitter. He denied abusing appellant.

On surrebuttal, appellee admitted that he signed the settlement agreement, which stated that there had been three instances of domestic abuse against appellant.

At the conclusion of the hearing, the ad litem declined to make a custody recommendation. She said that the girls would be fine in either home but noted that they are more bonded to appellant. The circuit court stated that it had a "serious problem" with appellant's testimony and found that it was in the children's best interest that custody be changed to appellee. More specifically, the court stated:

> I have a serious issue with the scenario she set up in November, with having the police descend on the school, when she knew full well Mr. Robinson had scheduled a time to come to Utah to see the kids. She lay in wait, she had that Order of Protection under way, she tried to follow through with it, going to the extreme of going into the judge and telling him it was an attempted kidnaping, when she knew full well there was nothing to that. That is an extreme attempt at alienation that I've rarely seen before. And, now, she's expressing that [C.R.1] is expressing fear to her. She never expressed fear in front of the Ad Litem, she's never expressed any kind of reticence about being with her father, except, oddly enough, to Ms. Robinson, who continues to make an exhibition of her fear of Mr. Robinson.
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> The manner in which she has handled the problems with [C.R.1] and her behavioral issues, essentially leaving Mr. Robinson out of the loop, as much as she can; refusing to give her address, the address where the children were going to live; refusing to let Mr. Robinson have the children at the airport at one in the morning. It wasn't like he was asking her to roll the children out of bed, at one in the morning so he could pick them up, they're in an airport. This entire scenario that she's painted gives me a terrible sense of foreboding that this kind of behavior, in spite of the tongue lashing I evidently gave last time, is going to continue and continue and get worse. And, that the comment that [C.R.1] expresses fear of her dad really sends a chill up my spine that this is where we're going next, is that she's going to teach the children to be fearful. And, I just -- I just think she's not going to be able to co-parent with

> Mr. Robinson. I think she's done everything to window dress – try to window dress – but her actions belie her words. And, while I take issue with some of the things that Mr. Robinson said or the way he has said them, I think he is much more inclined to follow a Court Order than Ms. Robinson is.
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> I don't for one second believe her testimony that she was oblivious to the fact that there would be a No Contact Order associated with an Order of Protection; that she couldn't figure that out or that she couldn't figure out how to get a hold of Matt Pabst before we had this big, giant display of police force at her children's school.

The circuit court granted appellant the same visitation with the girls that had been afforded appellee. The final order was entered on November 23, 2020, reiterating the court's oral ruling. More specifically, the circuit court found that it had rarely seen a more extreme attempt of alienation than appellant's actions: appellant's failing to inform appellee of their Utah address despite direct orders of the court to do so and despite appellee's numerous requests; and appellant's filing for an order of protection against appellee in Utah and testifying at the hearing that appellee tried to kidnap the children. The circuit court did not find appellant's testimony that she did not know the meaning of kidnap credible, and it also did not believe that C.R.1 was expressing fear of appellee. The circuit court found that appellant was not going to be able to coparent with appellee and found that it was in the children's best interest that custody be changed to appellee. Appellant filed a timely notice of appeal on December 21.

Appellant argues that the circuit court erred in finding a material changed in circumstances based on parental alienation. A judicial award of custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification of the decree will be in the best interest of the child or when there is a showing of facts affecting the best interest of the child that were either not presented to, or not known by, the trial

court when the original custody order was entered.[1] Generally, to promote stability and continuity in the life of the child and to discourage repeated litigation of issues that have already been decided, courts impose more stringent standards for modifications of custody than they do for initial determinations of custody.[2] The party seeking modification has the burden of showing a material change in circumstances.[3]

We review child-custody cases de novo, but we will not reverse a circuit court's findings unless they are clearly erroneous.[4] Because the question of whether the circuit court's findings are 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.[5] There are no cases in which the superior position, ability, and opportunity of the circuit court to observe the parties carry as great a weight as those involving minor children.[6]

This court has stated that whether one parent is alienating a child from the other is an important factor to be considered in change-of-custody cases because a caring relationship with both parents is essential to a healthy upbringing.[7] On the other hand, this court has

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[1]*Grindstaff v. Strickland*, 2017 Ark. App. 634, 535 S.W.3d 661.

[2]*Id.*

[3]*Id.*

[4]*Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003).

[5]*Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007).

[6]*Neumann v. Smith*, 2016 Ark. App. 14, 480 S.W.3d 197.

[7]*Evans v. McKinney*, 2014 Ark. App. 440, 440 S.W.3d 357.

held that a scattering of petty complaints does not amount to a failure to foster of a significant degree to support a finding of changed circumstances.[8]

Here, after hearing all the evidence, the circuit court found that a material change of circumstances had occurred that warranted a change in custody. The circuit court found it very concerning that appellee filed for an order of protection in Utah and testified at the hearing on the petition that appellee had tried to kidnap his children. The circuit court also did not like the fact that appellant kept her address from appellee despite his numerous requests for it. Additionally, the circuit court did not find appellant's testimony about the circumstances surrounding these events credible. On this record, we cannot say that the circuit court erred in finding that a material change in circumstances occurred due to appellant's attempted alienation of appellee from his children. To the extent that appellant is asking this court to reweigh the evidence, we decline to do so. It is well settled that we will not reweigh the evidence on appeal, and credibility determinations are left to the circuit court.[9]

Appellant also contends that even if there was a material change in circumstances, change of custody was not in the children's best interest. The circuit court found that based on the evidence presented, appellant could not coparent with appellee and that it was in the children's best interest that appellee be granted full and primary custody. Once the noncustodial parent has established a material change in circumstances, the court itself is to weigh the best interest of the child to determine which parent shall serve as the custodian

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[8]*Id.*

[9]*Blasingame v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 71, 542 S.W.3d 873.

of the child.[10] Having conducted our de novo review, we hold that the circuit court did not err in its finding that it was in the children's best interest that custody be changed to appellee.

Appellant argues that change of custody was not in the children's best interest because the circuit court could have just found her in contempt. While a circuit court has at its disposal the power to hold a party in contempt as a first step, there is no requirement that the court do so.[11] It is true that custody is not awarded to punish, reward, or gratify the desires of either parent.[12] However, parental alienation is an important factor to be considered in change-of-custody cases. The circuit court listened to the evidence and found that it had rarely seen a more extreme attempt of parental alienation then in appellant's case. It also found that appellant's actions would continue. Thus, it chose to change custody to appellee. We hold that the circuit court did not err by choosing not to use its power to hold appellant in contempt as a step preceding the change in custody.[13]

Affirmed.

KLAPPENBACH and VAUGHT, JJ., agree.

The Ballard Firm, P.A., by: *Andrew D. Ballard*, for appellant.

Wilkinson Law Firm, by: *Randall Wakefield*, for appellee.

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[10] *Grindstaff*, *supra*.

[11] *Evans*, *supra*.

[12] *Elliott v. Skaggs*, 2013 Ark. App. 720, 430 S.W.3d 837.

[13] *Grindstaff*, *supra*.