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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-21-64

SAM BAGGETT, JR.
APPELLANT

V.

ANGELA BAGGETT (BENIGHT)
APPELLEE

Opinion Delivered April 6, 2022

APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT
[NO. 43DR-13-627]

HONORABLE JASON ASHLEY PARKER, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Sam Baggett, Jr., appeals from an order of the Lonoke County Circuit Court denying his petition to modify visitation and awarding his ex-wife, Angela Benight, attorney's fees. He brings two points on appeal: (1) the circuit court erred in requiring the same proof of a material change in circumstances for a modification of visitation as is required for a modification of custody; and (2) the circuit court abused its discretion in awarding attorney's fees. We affirm the circuit court's order denying Sam's petition and awarding attorney's fees to Angela.

The parties in this case were divorced by decree entered January 23, 2014, and were awarded joint custody of their children, EB and AB, now ages thirteen and eleven. On July 26, 2016, the parties entered into an agreed order awarding Angela legal and physical custody of the children, subject to Sam's visitation specified in the order. Sam was awarded every other weekend plus a midweek visit on Thursday after school until 7:00 p.m. during

the school year and all day Thursday until 7:00 p.m. during the summer. He was also awarded an extended period of up to five consecutive days during the summer to take the children on a vacation, and the parties alternated holidays. Due to the acrimony between the parties, they were ordered to meet at the police department, park two spaces apart, and not exit their cars to exchange the children.

On September 18, 2019, Sam filed a motion for modification of orders, alleging that a material change in circumstances had occurred since the 2016 custody order and requesting joint custody with equal time and termination of child support. He contended that the changed circumstances included the following: the police had been called to Angela's home "multiple times over the last year due to domestic disturbances"; and the parties' co-parenting had improved as demonstrated by their attending lunch together at the children's school, shopping together for athletic equipment for the children, and discussing the children regularly. Angela moved to dismiss, citing the following provision of the 2016 agreed order: "Should either party wish to pursue a change in either custody or visitation they must first attend mediation unless emergency circumstances exist."

Angela also filed a motion for contempt and motion to modify child support, citing Sam's failure to pay the court-ordered child support and arrearage from the 2016 order. She also alleged that he had failed to reimburse her for the children's health-insurance premiums as ordered. Sam moved to dismiss his motion for modification without prejudice in order to allow the parties to attend a scheduled mediation. There is nothing in the record indicating that the court entertained this motion.

In any event, the parties attended mediation, which failed, and Sam filed a second motion for modification on January 24, 2020, again contending that there had been a material change in circumstances, citing the following changes in support of his motion:

a. That the police have been called to Plaintiff's home multiple times over the last year due to domestic disturbances;

b. That the parties' oldest child spoke to his school counselor regarding incidents that have occurred at his mother's home;

c. That the children have advised that Plaintiff's husband has cussed them and called them derogatory names.

d. That the children have advised that Plaintiff has told them to quit asking for more time with their dad because it won't happen.

e. Prior to Defendant's original filing in September 2019, the Plaintiff and Defendant's relationship had improved, and they discussed the children regularly, had attended lunch at the children's school together, had gone shopping together for athletic equipment for the children, and had generally provided a model example of co-parenting to the children;

f. That the Defendant's situation has changed and that additional visitation time with the children would be in the children's best interests.

Sam asked the court to award "equal time with the children" and order that neither party pay child support. He stated that he would consent to Angela's retaining "primary custody for decision making purposes" but wanted specific "co-parenting language" to ensure that he was allowed to have input on major decisions "in the areas of medical, educational, and extracurricular." Finally, he asked to court to appoint an attorney ad litem for the children.

Angela replied to Sam's motion, alleging that their initial joint-custody arrangement was changed in 2016 because joint custody had been an "absolute disaster." She contended that the parties had engaged in "highly contested litigation" lasting a year and resulting in the 2016 agreed order. She claimed that after "shirking his parental responsibilities for years

by failing to pay his court ordered child support and health care expenses for the children," Sam now requests the court to award joint physical custody and eliminate child support. She argued that joint custody was not in the children's best interests and asked the court to deny Sam's motion.

The court appointed Chris Lacy as attorney ad litem. He had previously served in that capacity for the children in the 2016 custody battle. The circuit court held a hearing on September 3, 2020, at which Lacy recommended against modification stating, "I just can't trust the stories that [Sam has] told" because he had told so many different stories. Both parties testified about their interactions regarding the children since the 2016 order. The court entered an order on October 15, 2020, denying Sam's motion and specifically finding that while things appeared to be "a little better," there had been no material change warranting modification of custody or visitation. Finding no material change, the court stated it did not reach the best interest of the children. The court also found Sam to be in willful contempt for failing to pay child support and health-insurance premiums. He was found to be in arrears on child support in the amount of $7,549 and on health-insurance premiums in the amount of $4,691.96, amounts to which the parties had stipulated at the beginning of the hearing. Finally, the court ordered Sam to pay 10 percent of the arrearage, or $1,224, in attorney's fees, in addition to $5,000 in attorney's fees for Angela's defense of his motion.

We review child-visitation and child-custody cases de novo on the record, and we will not overturn them unless they are clearly erroneous. *Goodman v. Goodman*, 2019 Ark. App. 75, at 7. When 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. *Id.*

Because a circuit court maintains continuing jurisdiction over visitation, it may modify or vacate a prior visitation order upon proof of a change in circumstances since the previous order. *Dare v. Frost*, 2018 Ark. 83, at 3, 540 S.W.3d 281, 283. Although visitation is always modifiable, to promote stability and continuity for the children and to discourage repeated litigation of the same issues, courts require more rigid standards for modification than for initial determinations. *Brown v. Brown*, 2012 Ark. 89, at 7, 387 S.W.3d 159, 163. Thus, the party seeking a change in visitation has the burden of demonstrating a material change in circumstances that warrants such a change. *Baber v. Baber*, 2011 Ark. 40, at 10, 378 S.W.3d 699, 705. Similarly, a party seeking modification of custody has the burden of showing a material change in circumstances. *Rice v. Rice*, 2016 Ark. App. 575, at 5, 508 S.W.3d 80, 84.

For his first point on appeal, Sam argues that the circuit court applied the wrong burden of proof by requiring him to demonstrate a material change of circumstances. He contends that he requested more visitation, not a modification of custody; that framing the issue as one for a modification of visitation rather than as a change of custody is critical to our analysis on appeal; and that reframing the issue will require us to reverse the circuit court's decision.

In support of his argument, he first cites Act 604 of 2021,[1] pursuant to which the legislature recognized that joint custody and equal time with each parent is in a child's best interest. He argues that, given this presumption, it is difficult to justify a different policy for visitation. He claims that the evidence here demonstrated that the parties' ability to co-parent went from non-existent in 2016 to effective co-parenting from which the children have benefited. He argues that because more time with fit parents is in the children's best interest, a circuit court must order it.

He also cites *Kennedy v. Kennedy*, 19 Ark. App. 1, 715 S.W.2d 460 (1986), claiming we distinguished a modification of custody and a modification of visitation and arguing that

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[1](iii) In an action for divorce, an award of joint custody is favored in Arkansas.

> (iv)*(a)* In an action concerning an original child custody determination in a divorce or paternity matter, there is a rebuttable presumption that joint custody is in the best interest of the child.
>
> *(b)* The presumption that joint custody is in the best interest of the child may be rebutted:
>
> *(1)* If the court finds by clear and convincing evidence that joint custody is not in the best interest of the child;
>
> *(2)* If the parties have reached an agreement on all issues related to custody of the child;
>
> *(3)* If one (1) of the parties does not request sole, primary, or joint custody; or
>
> *(4)* If a rebuttable presumption described in subsection (c) or subsection (d) of this section is established by the evidence.
>
> *(c)* The circuit court may enter an order to reduce areas of conflict in a manner determined appropriate by the court.

Ark. Code Ann. § 9-13-101(a) (Supp. 2021).

the case stands for the principle that a showing of a material change in circumstances is required only when the court modifies custody, not when it modifies visitation. In *Kennedy*, the noncustodial father petitioned for a change of custody. The then-existing order gave the father visitation every other weekend and six weeks in the summer. The circuit court found the father had not demonstrated a material change of circumstances, which was required to modify custody, but enlarged his visitation to approximately 60 percent of the children's time, finding it was in the children's best interest to do so. On appeal, we reversed because the modification was sufficiently material to constitute a change in custody regardless of the terminology used by the circuit court in referring to the modification as one of visitation. Because the circuit court found no material change in circumstances, we held it constituted an unauthorized change of custody.

To support his argument, Sam points to evidence that he and Angela had developed co-parenting skills that did not exist at the time of their last custody order and that he had moved to Cabot to be closer to the children. He cited evidence that the parties no longer exchange the children at the police station but at Angela's home; that they have gone together to purchase athletic equipment for the children; that they had attended one of the children's birthday parties together; and that they had coordinated functions for the children. While he admitted their relationship was "not perfect," he argued that great strides had been made that benefited the children. Sam said the court had chosen to "punish" him for seeking additional time with the children rather than recognizing and encouraging the improved parenting.

Although Sam's point on appeal claims that he petitioned for a modification of visitation rather than a modification of custody, we do not find his motions to be so clear. In his first motion, he asked that "the parties be awarded joint custody . . . with each party having equal time with the children." The language is a little different in the second motion in which he requests that the parties "be awarded equal time with the children with neither party paying child support" and states that he "would consent" to Angela retaining primary custody for decision making so long as he is allowed input regarding medical, educational, and extracurricular-activity decisions. In both motions, Sam asked for a significant change in the parenting schedule. Under the existing order, he had visitation with the children every other weekend, one night a week, and five days in the summer. His motions request the court to award him equal time with the children and to eliminate child support. This appears to us a request for a modification of custody. *See Kennedy*, *supra*.

Although Sam argues that our holding in *Kennedy* requires a circuit court to treat modification of custody and modification of visitation differently, *Kennedy* does not hold that a modification of visitation requires a different burden of proof. In any case, our supreme court has made it clear since *Kennedy* was decided that a party seeking a change in visitation has the burden to demonstrate a material change in circumstances that warrants such a change. *Dare*, 2018 Ark. 83, at 3, 540 S.W.3d at 283; *Brown*, 2012 Ark. 89, at 7, 387 S.W.3d at 163; and *Baber*, 2011 Ark. 40, at 10, 378 S.W.3d at 705. Because the requisite burden of proof is the same for both a modification of custody and a modification of visitation, we need not decide which one Sam requested. *See, e.g.*, *Eversole v. Eversole*, 2015 Ark. App. 645, 476 S.W.3d 199.

To the extent Sam argues that the court's determination that he had not demonstrated a material change in circumstances is clearly erroneous, we disagree. He contends that the parties had made positive strides in their co-parenting skills, that his attitude had improved since the 2016 agreed custody order, that he had since moved to Cabot to be closer to the children, and that it was in the children's best interest to spend equal time with the parties. The court recognized that things were "a little better" between the parties but stated that it would have been hard for them to have gotten much worse. The court said it was "still seeing the same behavior from the Defendant that concerned the Court before" and that the changes did not equate to a material change in circumstances warranting modification of custody or visitation. This is an issue of credibility for the circuit court, and we give special deference to the superior position of the circuit court in child-custody cases to evaluate the witnesses. *Schreckhise v. Parry*, 2019 Ark. App. 48, at 6, 568 S.W.3d 782, 786. We have said that a "custodial parent's change in attitude is not necessarily sufficient to constitute a material change." *Eversole v. Eversole*, 2015 Ark. App. 645, at 9, 476 S.W.3d 199, 205.

Finally, although we recognize the legislature's amendment to the child-custody statute, we note that the amendment states it applies to an original child-custody determination and does not change the burden of proof for a modification of custody or visitation. Further, Sam has cited no authority to support his argument that the presumption removes the material-change-in-circumstances analyses in these cases. We will not address an argument that is not supported by any legal authority, and the failure to cite authority or

make a convincing argument is sufficient reason for affirmance. *Garcia v. Garcia*, 2018 Ark. App. 146, 544 S.W.3d 96.

For his second point on appeal, Sam argues that the circuit court abused its discretion in awarding attorney's fees. The court awarded Angela $6,224 in attorney's fees after her attorney requested $9,000 in attorney's fees. Sam does not challenge the amount; rather, he contends that the court must consider the relative financial abilities of the parties when considering an award of attorney's fees in domestic-relations cases and that it is inequitable to award fees as punishment of a parent who avails himself of the court to request additional visitation time. Finally, he contends that a large portion of the proceedings, and thus legal fees, was due to Angela's abandoned cross-petition seeking a modification of child support.

It is well settled that the circuit court has the inherent power to award attorney's fees in domestic-relations proceedings. *Artman v. Hoy*, 370 Ark. 131, 137, 257 S.W.3d 864, 869 (2007). Moreover, when awarding attorney's fees in a domestic-relations case, the court is not required to conduct an analysis using the *Chrisco*[2] factors or make any particular findings. *Tiner v. Tiner*, 2012 Ark. App. 483, at 16–17, 422 S.W.3d 178, 187. Rather, in domestic-relations cases, where the court is intimately acquainted with the record and the quality of services rendered, we have held that the circuit court is in a better position than we to evaluate the services of counsel and observe the parties, their level of cooperation, and their obedience to court orders. *Conley v. Conley*, 2019 Ark. App. 424, at 11, 587 S.W.3d 241, 247. We will not disturb a circuit court's decision regarding attorney's fees absent a clear abuse of discretion. *Hargis v. Hargis*, 2019 Ark. 321, at 4, 587 S.W.3d 208, 211.

[2]*Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

Sam argues that the circuit court did not properly consider the parties' relative financial positions and that its failure to do so requires reversal. Although we recognize that the relative financial ability of each party is a consideration, it is not determinative. *Rye v. Rye*, 2021 Ark. App. 286, at 9, 625 S.W.3d 761, 767. Moreover, Sam did not make this argument to the circuit court, and we will not consider arguments that are raised for the first time on appeal where the circuit court was not given the opportunity to correct the error. *Abramson v. Eldridge*, 356 Ark. 321, 322, 149 S.W.3d 880, 881 (2004). Furthermore, the circuit court did not abuse its discretion in awarding fees. Although the evidence indicated that Sam was employed, Angela testified that the job she had held for twelve years was eliminated during the pandemic and that she was unemployed. Her only source of income at the time of the hearing was child support. And Sam stipulated before the hearing that he was over $12,000 in arrears for both child-support and health-insurance-premium payments to Angela.

Further, while one of his arguments against the award of fees is his contention that a large portion of the proceedings was due to Angela's abandoned cross-petition seeking a modification of child support, the circuit court did in fact reduce the requested amount of fees from $9,000 to $6,334. Again, we hold that the court's award of attorney's fees is not an abuse of discretion. The circuit court was intimately acquainted with the record and in a better position than we to evaluate the services of counsel and observe the parties, their level of cooperation, and their obedience to court orders. *See Conley*, 2019 Ark. App. 424, at 11, 587 S.W.3d at 247.

Affirmed.

VAUGHT and HIXSON, JJ., agree.

Leah Lanford, for appellant.

Brett D. Watson, Attorney at Law, PLLC, by: *Brett D. Watson*, for appellee.