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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-21-532

SARA STORMES APPELLANT V. TREY ELI GLEGHORN APPELLEE	**Opinion Delivered** October 26, 2022 APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DISTRICT [NO. 16JDR-18-107] HONORABLE MARY LILE BROADAWAY, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Sara Stormes appeals the Craighead County Circuit Court's August 2, 2021 order changing joint custody of the parties' two minor children to primary custody with appellee Trey Gleghorn. On appeal, Sara argues that the trial court erred when it failed to apply the clear and convincing standard of proof and that Trey failed to prove a material change in circumstances. We affirm.

I. *Jurisdiction*

Because the question of jurisdiction is a threshold matter, we first address Trey's argument that the trial court's order is not final for appeal purposes. He argues that Sara appealed from a nonfinal custody order and failed to appeal from a subsequent custody order in the record. He contends that both orders contemplated further evidence and proceedings on child custody. He cites Rule 2(d) of the Arkansas Rules of Appellate Procedure–Civil,

Ashley v. Ashley, 2021 Ark. App. 192, and *Beard v. Beard*, 2019 Ark. App. 537, 590 S.W.3d 174.

Rule 2(d) provides that all final orders awarding custody are final, appealable orders. In *Beard*, we said,

> [T]he question of whether an order is final and subject to appeal is a jurisdictional question that appellate courts have a duty to raise sua sponte. *Reed v. Ark. State Highway Comm'n*, 341 Ark. 470, 472–73, 17 S.W.3d 488, 490 (2000).
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> In *Gilbert v. Moore*, the Arkansas Supreme Court dealt with the finality of an order awarding custody of a child, and it explained that Rule 2(d) of the Arkansas Rules of Appellate Procedure–Civil allows for the appeal of a "final custody order" but that appellate courts must determine finality based on whether "the issue of custody was decided on the merits and the parties have completed their proof." 364 Ark. 127, 129, 216 S.W.3d 583, 585 (2005). In subsequent cases, the Arkansas Supreme Court and the Arkansas Court of Appeals have both applied this test, focusing on whether the order being appealed fully decided the issue of custody on its merits or contemplated the introduction of further proof. *See Ark. Dep't of Hum. Servs. v. Denmon*, 2009 Ark. 485, 346 S.W.3d 283.
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> Here, the divorce decree awarding joint custody clearly anticipates additional proof and a follow-up hearing. The court specifically ordered Jalen to "provide written proof" of his completion of an anger-management course and his attendance at Alcoholics Anonymous meetings. It further ordered the parties to make certain specified changes to how they communicate with each other and parent JB. The court then specifically set a "Review Hearing," which we understand to be an opportunity for the court to assess whether the parties have complied with these requirements. This procedure is in conflict with the well-established precedent that a party seeking to modify 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. Here, the divorce decree explicitly requires the parties to change their current circumstances and appears to make its joint-custody award conditional on proof of those changes. As such, the court's divorce decree is not a final award of custody because it depends on proof yet to be introduced.

Beard, 2019 Ark. App. 537, at 3–4, 590 S.W.3d at 176.

In *Ashley*, this court dismissed the appeal for lack of a final order, stating that

> [t]he testimony demonstrates that Jacob must have surgery to amputate a portion of his arm, be fitted for a prosthetic hand, obtain training on using the

> prosthesis, and undergo occupational therapy. The trial court's order provides that joint custody will take place only when Jacob moves to Charleston and secures an independent living space. In its ruling from the bench, the court said, "That may take three months, it may take six months, it may take two or three years. I don't know. And I don't think [Jacob] knows."

Ashley, 2021 Ark. App. 192, at 3. This court held that further proceedings were contemplated, citing *Beard*, 2019 Ark. App. 537, at 4, 590 S.W.3d at 176.

The distinguishing factor herein is that the contemplated proof in the trial court's order applies to the issue of supervised visitation, not custody, which was awarded to Trey without reservation. The postorder contempt petition and resulting orders do not change custody of the children but hold Sara in contempt and require further proof for the supervision requirement to be lifted. Accordingly, the custody order is final for purposes of appeal, and Sara's appeal is properly before this court.

II. *Facts*

The parties were divorced on December 12, 2019, and the decree awarded joint custody of their two children, ages five and two, with physical custody being alternated every week, and neither party paying child support. Corporal punishment was prohibited by the decree, the parents were ordered to take parenting classes, and Trey was to take anger-management classes. Further, the decree provided,

> Each party is to take a drug test which includes both hair follicle and urine every six (6) months at his or her own expense and provide the other with results within five (5) business days of the receptor for the result. The first drug test becoming due in six (6) months after this Order. In addition, either party may prepay for a drug test which would include hair follicle and urine, of the other in [sic] a twelve (12) hour notice. Any refusal to take said tests or any positive results on said tests for opioids or methamphetamine will immediately suspend that parties' [sic] custodial rights unless and until they are restored by a court of competent jurisdiction.

On November 19, 2020, Trey filed a contempt motion and request for emergency, temporary, and permanent custody. He alleged that Sara had failed to provide a drug test on June 12, which was six months from the date of the decree, and that as of the date of his motion, she had yet to provide the ordered test. He asked that her noncompliance be considered a refusal by her and that her custody be suspended. Trey also alleged that Sara had violated the decree in that she had (1) allowed overnight romantic visitors with the children present; (2) failed to complete parenting classes; (3) failed to allow phone communication between him and the children; (4) failed to make herself available for telephonic counseling appointments on two occasions; (5) failed to notify him of a counseling appointment; (6) failed to inform him about their child's disciplinary issues at school and the associated school meeting; (7) failed to pay her half of a debt as specified in the decree; and (8) failed to pay half of the children's medical expenses.

On December 3, the case was continued until December 14 on the emergency issues of drug testing and custody, and the other issues were reserved. Further, Sara was ordered to provide results of her hair-follicle test to Trey's counsel by 5:00 p.m. on December 4. If she failed to provide the results or if she failed the test, her custodial rights would be suspended "until further order of the court and reviewed on December 14, 2020." On December 7, Sara moved to modify the court's December 3 order to allow joint custody to continue because her hair-follicle drug-test results were negative.

On December 8, Sara filed a counterpetition for contempt and emergency temporary and permanent custody alleging that Trey continued to use corporal punishment against his son and that Trey's new wife has a thirteen-year-old son who bullies and leaves bruises on

the parties' six-year-old son. She further alleged that (1) Trey had failed to provide her with information regarding doctor's appointments for the children; (2) the receipts Trey provides "look to be illegitimate and manmade rather than coming from a provider's office"; (3) Trey refused to divide the 2018 tax refund; and (4) Trey refused to make student-loan payments as ordered.

After a hearing on December 14, the trial court found that Sara had failed to comply with the decree regarding drug testing and that the emergency suspension of her custody was proper. However, due to her negative drug screenings, Sara's rights were reinstated to joint custody.[1] Sara was ordered to submit to a nail-bed test by January 4, 2021. On December 22, the court ordered that Sara provide the drug-test results to the court on the day she receives them and that Sara would "maintain joint custody . . . until the test results are provided."

The nail-bed test was positive for marijuana, and custody reverted to Trey. On February 23, a temporary order resumed joint custody with Sara's custodial periods being supervised by her father at all times. She was ordered to provide a drug test every week, one week urine and the next hair-follicle. If any test was positive, custody would revert to Trey until the April 29 hearing.

On March 25, an attorney ad litem was appointed to represent the children, and on April 12, a modified temporary order required Sara to provide a seven-panel hair-follicle test every other week, and if Trey wanted a twelve-panel test, he would pay for it. Sara was

[1]The trial court noted that the urine-test results were questionable because of irregularities.

allowed unsupervised custodial periods with the children during the day, but overnights continued to be supervised.

A hearing was held on June 23, and Sara testified that she works at FedEx and that she is not comfortable giving Trey her work schedule. She said that she began dating a fifty-one-year-old man, Mr. Culp, whom she had met on a dating website a couple of months after the December 2019 divorce decree. She said that she had spent the night with him when the children were present, and she stipulated that the children would no longer be allowed around him. She testified that she had seen him around her children and that "I don't believe that he would do that," referring to allegations involving Culp and another child. "But, on the err of caution, I will not put my children in jeopardy." She testified that she did not comply with the decree's order that she take parenting classes before the contempt motion was filed because she did not realize the seriousness of the court order, but she appreciates it now. The same is true for the prohibition on romantic overnight guests and the use of hydrocodone or opioids, which she thought referred only to nonprescription or illegal opioids. She said that she was not advised that prescription-opioid use was forbidden by the decree and that she did not disclose all the pharmacies she uses because it had slipped her mind.

Sara testified that she had a seizure at work on November 20, 2020, and that she was taken by ambulance to the hospital. She told the EMTs that she had taken hydrocodone, but she did not include it on her medication list. After she was checked into the hospital and some blood work was done, she was told it was time for a urine test, and she left before taking one. Her leaving was against medical advice, and the doctor had told her she could

die and that she needed to stay. She said that she did not get the seizure medically addressed and that the next week she drove her children in her car. She said that when she went back to the doctor on November 29, she did not disclose that she had a seizure nine days before.

Sara testified that since the decree, she met a guy named Devon in a bar one night, had a few beers, went outside with him, bought marijuana from him, and smoked it. She does not remember how she got home, and she cannot remember the details of that night. She got her medical-marijuana card in January 2021. She said that she has not told Dr. Haydar that she got her medical-marijuana card and that she got the card to help her mental health. She said that her Xanax prescription has increased and that she is also prescribed other medications. She said that she obtained the medical-marijuana card after she failed the drug test for marijuana. Sara testified that she did not take the drug test as ordered six months after the decree, that it was not good judgment, and that at the time, she did not think anything about it, good or bad. She believes that in June 2020 she was using illegal marijuana, but she said that was not the reason she did not take a drug test.

Sara testified that she tried to make sure that Trey got his phone call from the children, and if her father or her stepmother did not allow the children to call while caring for them when she was working, she tried to accommodate by calling the following morning. She said that the nail-bed drug test taken on December 31, 2020, was positive for marijuana but negative for opioids. She said that it has been brought to her attention that she needs to find out the cause of her seizures, and she intends to do so. She said that she told Dr. Haydar about her seizure and that she told him she got a medical-marijuana card after the fact.

Dr. Ali Haydar testified that he works at NEA Baptist, that he is a family physician, and that he has treated Sara intermittently since June 4, 2020. He said that Sara has not told him about her marijuana use. He prescribed hydrocodone to Sara on November 19, 2020, for hip pain, and on December 9, 2020, for an aggravation of her hip injury. Sara's medical records do not reflect that Sara had a seizure and went to NEA Baptist on November 29. He said that when he signed the form allowing her to drive in February 2021, she did not tell him that she uses medical marijuana. He also said that he may not have taken good notes during their appointment.

Trey testified that he completed the drug test as required by the decree and delivered the results to Sara in May 2020. By September, she still had not complied with the decree, so he hired an attorney, and Sara finally complied in December 2020. He asked that he be released from the drug-test obligation because he has always tested negative. He is concerned about Sara's marijuana use, and he said that joint custody is not working. He said that Sara is not accommodating, that she will not provide her work schedule, and that she has not attended therapy for their child on at least two occasions. He also testified about the court-ordered payments that Sara had failed to pay.

Donna Brooks testified that she had dated Sara's father since 2007, that she considers Sara to be her daughter, and that she considers Sara's children to be her grandchildren. She believes Sara is a good mother and does what she is supposed to do. Lonny Stormes testified that he is Sara's father, and he did not know if the children watched inappropriate videos at his house. He said that the parties' son had a scratch on his face and that the boy had talked to the school counselor about it.

Trey was recalled, and he explained that the scratch on his son's face was the result of an accident. Sara was recalled and said that she is concerned about Trey's anger. She was asked about the amount of Xanax she takes, which is one milligram, two to three times a day, and she could not explain why her drug screens were negative for Xanax. She said that she had begun working out and had increased her water intake.

The trial court's August 2 order provides that Trey is awarded primary custody, and Sara's visitation is supervised. The order states,

> Sara is to obtain a general letter of compliance from her therapist and psychiatrist 90 days following the entry of the order. A copy of these general compliance letters only should be provided to the court and Trey upon receipt. Trey is not to have access to Sara's private medical records without court approval. If Sara provides these letters, and her seizure issues are being appropriately dealt with, the court will issue a supplemental order lifting the supervision requirement.

Further, the court found Sara in contempt but suspended imposition of any punishment based on her further compliance.

On August 10, based on Trey's emergency motion, the trial court suspended Sara's visitation until further order was filed, and a hearing was set for August 21. In the meantime, on August 17, Sara filed a notice of appeal of the August 2 order, and Sara's father filed a petition for grandparent visitation.

On September 1, the court ordered that the hearing was continued until September 9, and Sara's visitation continued to be suspended. After a hearing on September 9, the court found Sara in violation of the court's order for driving the children without written medical clearance or providing a safety plan, that she had continued to foster a relationship between the children and Mr. Culp, and that she had failed to pay child support and past medical bills as ordered. Her visitation was amended to specified days, and unsupervised

visitation would be lifted when she produced a written safety plan, a medical clearance letter from a neurologist, and a general compliance letter from her therapist and her psychiatrist. She was held in contempt and sentenced to ten days in jail, which was suspended depending on her compliance.

III. *Burden of Proof*

In an action concerning an original child-custody determination in a divorce matter, there is a rebuttable presumption that joint custody is in the best interest of the child. Ark. Code Ann. § 9-13-101(a)(1)(A)(iv)*(a)* (Supp. 2021). The presumption that joint custody is in the best interest of the child may be rebutted if the court finds by clear and convincing evidence that joint custody is not in the best interest of the child. Ark. Code Ann. § 9-13-101(a)(1)(A)(iv)*(b)(1)*. This court reviews issues of statutory interpretation de novo. *Ryan v. White*, 2015 Ark. App. 494, at 5, 471 S.W.3d 243, 247. In reviewing issues of statutory interpretation, a court will determine the meaning and effect of a statute first by construing the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* When the statute's language is clear and unambiguous, there is no need to look further and apply the rules of statutory construction. *Id.*

Sara argues that the legislature has expressed this state's policy by making joint custody mandatory unless the opposing party proves by clear and convincing evidence that joint custody is not proper. Ark. Code Ann. § 9-13-101(a)(1)(A)(iv)*(b)(1)*. She also contends that the trial court is mandated to state the facts proven by clear and convincing evidence to support a ruling other than joint custody. *Id.* She argues that the trial court did not use

the clear and convincing standard of proof and that the court did not make written findings of fact and conclusions of law.

Sara did not argue below that Arkansas Code Annotated section 9-13-101 requires a showing of clear and convincing evidence to change custody. It is well settled that the appellate courts will not consider arguments made for the first time on appeal; an appellant is limited by the scope and nature of the objections and arguments presented at trial. *Janjam v. Rajeshwari*, 2020 Ark. App. 448, at 19, 611 S.W.3d 202, 213. Even if the argument is preserved, the section cited is limited to "an original child custody determination." Ark. Code Ann. § 9-13-101(a)(1)(A)(iv). *See Baggett v. Benight*, 2022 Ark. App. 153, at 10, 643 S.W.3d 836. Accordingly, we affirm on this issue.

II. *Material Change in Circumstances*

Our standard of review is well settled:

> This court reviews domestic-relations cases de novo, but we will not reverse the trial court's findings unless they are clearly erroneous. *Doss v. Doss*, 2018 Ark. App. 487, 561 S.W.3d 348. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* Due deference is given to the trial court's superior position to determine the credibility of witnesses and the weight to be given their testimony. *Id.*
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> Whether a trial court's findings are clearly erroneous turns in large part on the credibility of the witnesses, and special deference is given to the trial court's superior position to evaluate the witnesses, their testimony, and the child's best interest. *Cunningham v. Cunningham*, 2019 Ark. App. 416, 588 S.W.3d 38. There are no cases in which the trial court's superior position, ability, and opportunity to observe the parties carry as great a weight as those involving minor children. *Id.* The primary consideration in child-custody cases is the welfare and best interest of the child, with all other considerations being secondary. *Id.*
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> The party seeking modification of the custody order has the burden of showing a material change in circumstances. *Jeffers v. Wibbing*, 2021 Ark. App. 239, at 7. Courts impose more stringent standards for modifications in custody than they

> do for initial determinations of custody to promote stability and continuity in the life of the child and to discourage repeated litigation of the same issues. *Id.* In order to change custody, the trial court must first determine that a material change of circumstances has occurred since the last order of custody, and if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the child. *Acklin v. Acklin*, 2017 Ark. App. 322, at 2, 521 S.W.3d 538, 539. In custody appeals, this court considers the evidence de novo and does not reverse unless the trial court's findings of fact are clearly erroneous.

Bell v. Bell, 2022 Ark. App. 279, at 3–5, 646 S.W.3d 678, 682–83.

Sara argues that Trey failed to prove a change in circumstances to warrant a modification in custody. She contends that when they were divorced, (1) both had been abusing prescription or nonprescription drugs; (2) Trey was controlling, and the parties could not cooperate; (3) Sara suffered from depression and took prescription medication for it; (4) Trey had an anger issue, and the trial court found that he had used "appalling corporal punishment of the children." She argues that at the time of the trial, nothing had changed except that Trey appears to no longer be abusing hydrocodone. Sarah claims that she has changed for the better because she no longer tests positive for any nonprescribed medication; although, she admits that she did not follow the decree's mandate to drug test after six months. She contends that Trey's petition complained only about her failure to submit to drug tests, to which she now regularly submits, and as noted by the court's order, she is "fully aware of the implications of not complying with a court order and the consequences thereof."

Sara contends that once she learned about Trey's concerns regarding Culp, she severed that relationship. She also asserts that her treating physician signed a document allowing her to drive. Sara argues that their failure to cooperate is not a change and that

there was no proof that the children were ever around her while she was using prescription marijuana. She contends there was no proof that the children have been impacted and that the closest thing would be when she spent the night with the children in a separate hotel room from Mr. Culp. *See Calhoun v. Calhoun*, 84 Ark. App. 158, 138 S.W.3d 689 (2003) (it may be the adverse impact on a child that makes a change in circumstances material in some instances). Sara recites the testimony in regard to the child's version of events surrounding a mark on his cheek, as retold to his counselor; however, she does not recite Trey's testimony of his version of events and the trial court's conclusion that Trey was sincere.

She relies on *Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002), wherein the appellant had remedied the issues, and the court could not cite them as a ground for a change in custody. She contends that in *Skinner v. Shaw*, 2020 Ark. App. 407, 609 S.W.3d 454, this court relied on *Vo*, which held that the relocation issue was moot. *Skinner*, 2020 Ark. App. 407, at 8, 609 S.W.3d at 459 (citing *Vo*, 78 Ark. App. at 140–41, 79 S.W.3d at 392). Sara argues that she, too, has remedied the issues, that any changed circumstances are moot, and that violation of the court's previous directives does not compel a change in custody. *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998).

Sara argues that custody awards are not made or changed to punish, reward, or gratify the desires of either parent. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). Violation of court orders can be considered as a factor in changing custody. *Hepp*, *supra*; *Johnson v. Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975). She argues that contempt powers should be used prior to the more drastic measure of changing custody, *Carter v. Carter*, 19

Ark. App. 242, 719 S.W.2d 704 (1986), and that custody is not to be changed merely to punish or reward a parent, *Harvell v. Harvell*, 36 Ark. App. 24, 820 S.W.2d 463 (1991). Sara contends that she has addressed every issue and that the trial court acknowledged such. Thus, she claims that no change of circumstances was proved sufficient to modify custody.

We disagree and embrace Trey's argument that the record is full of evidence supporting a material-change-of-circumstances finding. The trial court's credibility determinations are given deference, and the court found that Trey did not abuse the child, contrary to Sara's argument on appeal. As in *Skinner*, *supra*, behavior demonstrating an inability to protect the minor children or behavior placing them in imminent danger can constitute a material change in circumstances. The parents' inability to cooperate on joint custody, remarriage, exposing the children to a dangerous new romantic interest, and serious illegal and legal drug abuse and medical concerns are all recognized factors supporting a material change. *See Roberts v. Roberts*, 2020 Ark. App. 60, 595 S.W.3d 15 (remarriage a factor in material-change inquiry); *Case v. Van Pelt*, 2019 Ark. App. 382, 587 S.W.3d 567 (inability to cooperate is material change in circumstances); *Wadley v. Wadley*, 2019 Ark. App. 549, 590 S.W.3d 754 (discussing unmarried cohabitation as factor in modification of visitation); *Boudreau v. Pierce*, 2011 Ark. App. 457, 384 S.W.3d 664 (facts present clear potential for harm).

Trey contends that the order on appeal is not the product of the trial court's desire to punish Sara. Rather, he argues that it was a thoughtful and measured reaction to the significant changes created by Sara's poor decisions and illicit behavior, including her decision to avoid court-ordered drug testing and flee the emergency room when she was

asked to submit to a drug test. Giving special deference to the trial court's superior position to evaluate the witnesses, their testimony, and the child's best interest, we hold that the trial court's finding of a material change in circumstances is not clearly erroneous.

Affirmed.

KLAPPENBACH and HIXSON, JJ., agree.

Ogles Law Firm, P.A., by: *John Ogles*, for appellant.

Scholtens Law Firm, PLC, by: *Jay Scholtens*; and *Blair & Stroud*, by: *Barrett S. Moore*, for appellee.