

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CV-22-17

KELLEY L. SAUNDERS

APPELLANT

V.

RYAN E. SAUNDERS

APPELLEE

Opinion Delivered October 26, 2022

APPEAL FROM THE CLEVELAND
COUNTY CIRCUIT COURT
[NO. 13DR-14-84]

HONORABLE MARY THOMASON,
JUDGE

AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Kelley L. Saunders¹ (Kelley) appeals from the Cleveland County Circuit Court's order granting a motion for change of custody and awarding appellee Ryan E. Saunders (Ryan) custody of the parties' minor child. On appeal, Kelley contends that (1) the circuit court erred by failing to consider and make findings on joint custody, and (2) the circuit court's factual findings are clearly erroneous. We affirm.

I. Facts

The parties were married on April 19, 2008, and have two children, Minor Child 1 (MC1) (DOB 4-6-2010) and Minor Child 2 (MC2) (DOB 5-5-1999). A decree of divorce

¹The record reflects that her name was subsequently changed to Kelley Manning after she had remarried.

was filed on April 27, 2015. The decree awarded primary custody of both children to Kelley, and Ryan was awarded reasonable visitation.²

Ryan filed a motion for change of custody on October 31, 2020. In his motion, he alleged that a material change in circumstances had arisen warranting a change of custody and that it was in the best interest of the minor child that he be granted custody. Ryan more specifically alleged that he would be able to provide a more stable environment for the minor child, that Kelley worked the night shift from 6:00 p.m. to 6:00 a.m., that Kelley's boyfriend was living in the home, and that the parties' minor child had changed schools four times since the parties divorced. Kelley filed her answer on February 19, 2021, requesting that the circuit court deny Ryan's motion and award her attorney's fees and costs. A hearing on the motion was held on September 7, 2021.

Ryan's attorney called Kelley as his first witness. Kelley testified that following the divorce from Ryan, she was involved with Justin Manning. Kelley gave birth to a child, Minor Child 3, and two months later, she and Justin were married. They were divorced on February 24, 2021, and Kelley was awarded custody of Minor Child 3. Kelley was then involved in a relationship with Billy Green. Then, immediately prior to the hearing, Kelley was involved in a relationship with a married man, Brent Wallace. Relevant to the issue of custody, Kelley admitted that all three men with whom she had been involved had stayed

²MC2 has reached the age of majority and graduated high school; thus, this appeal involves the custody of only MC1.

at her home overnight and, further, that she had sent nude photographs of herself to Mr. Wallace.³ At the time of the hearing, MC1 was eleven years old.

Kelley testified that following her divorce from Ryan, she and their children moved from the Rison School District to the Sheridan School District. In September 2020, Kelley moved from Sheridan, Arkansas, to Maumelle, Arkansas. However, Kelley sought to enroll MC1 in the Benton School District, alleging that she was living with her sister in Benton, Arkansas. Eventually, in January 2021, Kelley moved to an address in Benton and continued to live at that address at the time of the hearing.

Kelley testified that she is employed as a nurse and works some nights, weekends, and holidays. When she works, she currently provides childcare for MC1 at the childcare provider's home off Fair Park Boulevard in Little Rock. When the childcare provider is unavailable, MC1 is cared for alternately by his twenty-two-year-old sister, MC2; Kelley's mother; and Mr. Wallace, the married boyfriend. Kelley testified that she is able to leave her job at the VA Hospital in Little Rock at 7:00 a.m., pick up MC1 from the childcare provider, take him home, feed him breakfast, finish getting him ready for school, and have him to school at 8:00 a.m. in Benton.

Regarding MC1's school attendance and progress, Kelley admitted that MC1 had excessive absences from school and that she had received truancy letters. Her explanation was that that MC1 has ADHD and an individualized education plan with the school and that MC1 struggles with reading and writing. However, she testified that some of MC1's

³This testimony subsequently became relevant when it was explained that the cell phone previously owned by Mr. Wallace had been given to MC1, and the sexually explicit photographs of Kelley remained on the cell phone.

tardies were the result of traffic or a wreck on her drive to Benton. She denied that any of his teachers had expressed that MC1 is struggling in school and instead testified that they have told her that he continues to make progress every year when she meets with them. Kelley testified that since MC1 had been enrolled in the Benton School District, he was earning mostly As and Bs. She stated that MC1's education is important to her and that she has tried very hard to keep in touch with his teachers.

The evidence revealed that MC1's cell phone contained pornographic photographs and that at least one of the photographs was of his mother, Kelley. When Kelley was questioned about whether she was aware that MC1 had pornographic photographs on his cell phone, she explained that she had only recently become aware of the issue. She explained that MC1's cell phone had previously belonged to Mr. Wallace, and Mr. Wallace gave MC1 the cell phone with her approval. Kelley testified that she sent the photographs of herself to Mr. Wallace, and she thought Mr. Wallace had deleted the photographs from the cell phone. Kelley admitted that one of the photographs found on the phone was of her. The photograph was admitted into the evidence, and Kelley was topless in that photograph. Kelley also admitted that she had done some modeling and posted photographs of herself on Facebook. She denied that the photographs were "erotic" but later admitted that a few of them were "suggestive." Three of the Facebook photographs were admitted into evidence. Kelley testified that MC1 does not have access to Facebook or Instagram but that he has access to YouTube. However, she was able to monitor his YouTube usage and had not seen any pornographic photographs to her knowledge.

Ryan testified that he had remained a resident of Cleveland County, Arkansas, throughout the case. He married Kristie Saunders (Kristie) on November 23, 2016. Ryan has two stepdaughters who reside with him and Kristie who attend school in the Rison School District.

Ryan testified that he is an industrial-controls technician and that Kristie is an alternative-learning teacher at England Elementary. Ryan explained that if he were given custody, he would be able to drop off and pick up MC1 from school. Ryan expressed several of his concerns regarding MC1's care while in Kelley's custody. He explained that he was concerned that Kelley had introduced MC1 to at least three different men since their divorce. He also was concerned that MC1 was missing too much school according to the school records he had obtained. The school records were admitted into evidence without objection. Ryan testified that in kindergarten, MC1 had eight absences and six tardies; in first grade, MC1 had eleven and a half absences and twelve tardies; in second grade, MC1 had fifteen absences and fifteen tardies; in third grade, MC1 had twelve and a half absences and fourteen tardies; in fourth grade, MC1 had thirteen and a half absences and eleven tardies; and in fifth grade, MC1 had eleven absences and three tardies. Because MC1 had gotten behind as a result of missing so much school, both Ryan and Kristie had been working with him to try to get him caught up while he was in their care.

Ryan testified that he saw that MC1 had the "Messenger App" on the cell phone Mr. Wallace had given MC1. After investigating the applications and files on the cell phone, he discovered that there were "tons of pornographic pictures of just random people." He deleted the photographs from the cell phone, but when MC1 returned for visitation two

weeks later, the photographs were back on the cell phone. It was at that point that Ryan took a screen recording and deleted the photographs again. Ryan did not ask MC1 if he had seen the photographs before he deleted them, but he hoped that he had not been exposed to them. Ryan acknowledged that he did not call Kelley about the photographs when he found them, and he explained that Kelley was “very hard to deal with” and that he felt he did not need to alert her because she would have already known about it in the first place.

Ryan testified about his relationship with his adult daughter, MC2. Ryan testified that he was aware of an allegation that MC2 had “pull[ed] a gun at one point” because Kelley had texted him about it. Ryan explained that he no longer sees MC2 because he does not approve of her lifestyle. He became aware that MC2 used drugs, and her photographs could be found on “Only Fans,” which he testified is a website where one can sell nude photographs and videos. Some photographs from MC2’s public Instagram account were admitted into evidence.

Ryan explained that while MC1 is in his care, he takes him camping, fishing, and to rodeo events. They also attend church every Sunday. He has a four-bedroom home, and MC1 has his own room. Ryan testified that he is financially stable and that it had been almost five years since he had consumed any alcohol. He felt that he would be able to provide MC1 a more stable environment and that he would be able to provide him more opportunities. He testified that Kelley had refused to provide her address to either her home in Maumelle or where she was currently living.

Ryan's wife, Kristie, corroborated Ryan's testimony. She explained that she and Ryan had been married for almost five years. Kristie testified that she had been teaching for nineteen years; specifically, she teaches alternative-learning students in kindergarten through sixth grade that typically had individualized education plans similar to the education plan in place for MC1. She explained that she felt that she and Ryan could help MC1 with some of his learning issues. Kristie testified that because MC1's report card reflected mostly Cs, they had been working with MC1 when he was in their care and that, as a result, MC1's grades had recently improved to mostly As and Bs.

Wesley Sparks, Ryan's pastor and friend, testified that he had met Ryan five years ago at Watson Chapel Baptist Church in a Sunday school class. Mr. Sparks testified he is now the pastor of Whispering Pine and that MC1 attends church and activities with the church while he is with Ryan. Mr. Sparks testified that MC1 "seemed happy and well-adjusted" while at church.

Kathie Willoughby, Kelley's mother, testified that after Kelley's divorce from Mr. Manning, she had driven from her home near Mansfield, Arkansas, to stay with the children every week from August 2020 until May 2021 while Kelley was at work. Ms. Willoughby further testified that Kelley would finish getting MC1 ready for school when she came home from work and would take him to school. Kelley eventually hired a babysitter that Ms. Willoughby found through the recommendation of a friend. On cross-examination, Ms. Willoughby admitted that Kelley did not have to take MC1 to school part of the previous school year because his school was virtual due to COVID-19.

Tracy Campbell, Kelley's older sister, testified that she lives in Benton, Arkansas, close to Kelley. Ms. Campbell testified that she thinks Kelley is the most loving and supportive mother she has ever known. She further explained that MC1 has a good relationship with his younger stepbrother. On cross-examination, Ms. Campbell admitted that she was aware that Kelley used her address for school documentation even though MC1 does not actually live at her home.

After hearing oral arguments, the circuit court took the matter under advisement. The circuit court did, however, announce that it felt there was a material change of circumstances and that "[i]t's just a matter of the best interest of the child." The circuit court issued a letter opinion on September 10, 2021. The letter opinion recited much of the testimony presented at the hearing. Regarding a material change in circumstances, the circuit court made the following relevant findings:

The Defendant [Kelley] admitted there was a truancy letter from the Sheridan School District concerning [MC1]. The Defendant advised there was a time period where she could not get [MC1] enrolled in school from when she moved from Sheridan to Maumelle. One of the factors contributing to this was that [MC1] did not live in the Benton School District and she was only using her sister's address. Still, if the Defendant was going to use her sister's address there is no reason why [MC1] was not immediately enrolled in that school district. There were also records of excessive tardies.

The Defendant testified that her children stay overnight in the home of their babysitter off of Fair Park Blvd. in Little Rock. The Defendant gets off of work at 7 a.m., picks up the children, takes them home, feeds them breakfast, finishes getting them ready, and has them at school by 8 a.m. It is hard for the Court to believe that with the traffic in the Benton/Little Rock area and the Defendant's work at the VA Hospital as a nurse that all tasks she testified to could be accomplished between her getting off and having the children to school at 8 a.m.

[MC1]'s test results at school clearly show he is below benchmark and the Student Information Sheet introduced as Plaintiff [Ryan]'s Exhibit 6 indicates [MC1] is being pulled out of regular class for reading and math.

The child's academics, absences, tardies and his exposure to three different men in the Defendant's home are all indicative of a change in circumstances on behalf of the Defendant.

Regarding best interest, the circuit court made the following relevant findings:

The Defendant gave birth to another child on May 6, 2017, and married Justin Manning on July 15, 2017, who is the father of that child. Mr. Manning had been living with the Defendant prior to the marriage in the presence of [MC1] and the Defendant's older daughter. There was testimony given that at some point that the Defendant's daughter, [MC2], pulled a gun on Mr. Manning. When questioned about the incident, the Defendant stated she did not see the incident but admitted she was at home at the time of incident. The Defendant gave no explanation as to why her teenage daughter would have a gun or what allegations were made by her daughter that would lead to the incident. The Defendant did deny that Mr. Manning had any drugs in her home.

Again, the issue in this matter is the minor child, [MC1]. [MC1] was left alone with Mr. Manning and was under his care at times while his mother was working.

Somewhere in the makeup was the Defendant's relationship with Billy Green, which the Defendant admitted had stayed overnight at her home with [MC1] present. The Defendant was engaged to marry Mr. Green, but never offered a reason the relationship ended other than it did not work out.

The Defendant is now involved with Brent Wallace and has been for one year. Mr. Wallace is a married man. The Decree of Divorce between the Defendant and Justin Manning (Defendant's Exhibit 2) indicated that Mr. Manning and the Defendant did not separate until August 9, 2020. At the hearing in this matter, the Defendant testified that she had been in a relationship with Mr. Wallace for a year. Therefore, their relationship had to have begun shortly after her separation from Mr. Manning. The Defendant testified that Mr. Wallace has also kept [MC1] while she works and that her daughter, [MC2], has kept [MC1] while she works.

The Defendant appears to be okay with having a married man living in her home with [MC1] present and also leaving [MC1] in his care. There was also testimony that [MC1] had been given a phone that belonged to Mr. Wallace. On that phone was a nude picture of the Defendant, as well as photos from a porn website. The Plaintiff testified that he removed those photos from [MC1]'s phone and the next time [MC1] came to visit the pictures were back on the phone.

The Defendant cannot deny the nude photo of herself, but testified she sent that to Mr. Wallace just as she sent the Plaintiff nude photos when they were married. The

Defendant is not married to Mr. Wallace. Certainly, no child should have a nude photo of their parent on their phone.

There were photos of the Defendant introduced as Plaintiffs Exhibit 3 that are posted on the Defendant's Facebook page. The Defendant advised that she has modeled for four different photographers and that she has modeled for one of them, TJ Boarman, on more than one occasion. The Defendant denied that any of the photos were erotic in nature. Certainly, the "water dolphin" photo and other photos posted by the Defendant are clearly inappropriate for a child to view. The Defendant offered as her defense that [MC1] did not have Facebook. The child could certainly see Facebook on a friend's phone or his friends could tell him about what his mother has posted. Even more, [MC1] had the nude photo of his mother on his own phone. This is clearly irresponsible on behalf of the Defendant and not in [MC1]'s best interest.

The Plaintiff works for the Pine Bluff Arsenal and has also started a business on the side in which he uses subcontractors to do electrical repair work. The Plaintiff testified that he can drop off and pick up [MC1] from school each day. The Plaintiff's wife is a school teacher in the England School District and assisted [MC1] in catching up with his school work. Her two daughters attend the Rison School District, which would be the school that [MC1] would attend.

The Plaintiff attends church. His pastor and friend, Wesley Sparks, testified he had met the Plaintiff five years ago at the Watson Chapel Baptist Church. Mr. Sparks testified he is now the pastor of Whispering Pine and that [MC1] attends church and activities with the church while he is with the Plaintiff.

The Plaintiff described his home as being a four-bedroom home in which [MC1] would have his own room. The Plaintiff stated they had animals and acreage for activities and 4-wheeler riding. The Plaintiff testified that he and [MC1] liked to camp and do outdoor activities together.

When considering all of the factors, especially the lifestyles that both of the parties[] lead, it is in the best interest of [MC1] that custody be placed with the Plaintiff, Ryan Saunders, and that the Defendant, Kelley Manning, receive visitation pursuant to the Court's Standard Visitation Guidelines which are attached hereto and shall be attached to the final order.

The circuit court subsequently filed a written order incorporating the findings made in its letter opinion by reference and finding that there had "been a material change in circumstances and [that] it is in the best interest of the minor child that custody of [MC1] (DOB: 04/06/10) be placed with [Ryan]." This appeal followed.

II. *Standard of Review*

In reviewing child-custody cases, we consider the evidence de novo, but we will not reverse the circuit court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *McNutt v. Yates*, 2013 Ark. 427, 430 S.W.3d 91. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Cooper v. Kalkwarf*, 2017 Ark. 331, 532 S.W.3d 58. It is well settled that the primary consideration is the welfare and best interest of the child, while other considerations are merely secondary. *McNutt, supra*. We give due deference to the superior position of the circuit court to evaluate and judge the credibility of the witnesses in child-custody cases, and this deference to the circuit court is even greater in cases involving child custody because a heavier burden is placed on the circuit court to utilize to the fullest extent its powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Cooper, supra*. Further, the party seeking modification of a custody order has the burden of showing a material change in circumstances. *Jeffers v. Wibbing*, 2021 Ark. App. 239. 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 circuit 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, 521 S.W.3d 538.

III. *Joint-Custody Consideration*

We note that in 2013, the General Assembly amended Arkansas Code Annotated section 9-13-101(a)(1)(A)(iii) (Supp. 2021) to announce that in divorce actions, an award of joint custody is “favored” in Arkansas. Act 906 of 2019. Previously, case law held that joint custody was not favored unless circumstances clearly warranted such action. *Pace v. Pace*, 2020 Ark. 108, 595 S.W.3d 347. The statute further provides that “[w]hen in the best interest of a child, custody shall be awarded in such a way so as to assure the frequent and continuing contact of the child with both parents consistent with subdivision (a)(1)(A) of this section.” Ark. Code Ann. § 9-13-101(b)(1)(A)(i). In 2021,⁴ the General Assembly amended the next subdivision, (b)(1)(A)(ii), to state that “the circuit court *shall* consider awarding joint custody of a child to the parents in making an order for custody.” Act 604 of 2021 (emphasis added).

Kelley argues on appeal that the circuit court failed to consider joint custody in contravention of the statute favoring joint custody. She further argues that the circuit court failed to consider joint custody at all because at the conclusion of the hearing, the circuit court stated that it believed there was a material change of circumstances and that “[i]t’s just a matter of the best interest of the child.” She additionally quotes from the circuit court’s written findings: “When considering all of the factors, especially the lifestyles that both of

⁴The General Assembly also added Arkansas Code Annotated section 9-13-101(a)(1)(A)(iv), creating a “rebuttable presumption” that joint custody is in the best interest of the child in an action concerning an original child-custody determination in a divorce or paternity matter. Act 604 of 2021. Because this is not an original child-custody determination, that amendment does not apply here and does not change the burden of proof for a modification of custody or visitation. See *Baggett v. Benight*, 2022 Ark. App. 153, 643 S.W.3d 836.

the parties' lead, it is in the best interest of [MC1] that custody be placed with the Plaintiff, Ryan Saunders." Kelley alleges that these two statements show that the circuit court failed to consider joint custody as required under the statute and argues that we must therefore "remand the matter for re-trial[.]" We disagree.

Even though our legislature has amended Arkansas Code Annotated section 9-13-101 to state that an award of joint custody is favored in Arkansas and that a circuit court must consider joint custody in making an award, joint custody is by no means mandatory under the statute. *See Allen v. Allen*, 2021 Ark. App. 263. The statutory preference for joint custody does not override the ultimate guiding principle that the best interest of the child is the polestar for a custody determination. *Id.* Further, a failure by the circuit court to award joint custody does not mean that the circuit court failed to consider awarding joint custody. *See Carrillo v. Morales Ibarra*, 2019 Ark. App. 189, 575 S.W.3d 151; *Wilhelm v. Wilhelm*, 2018 Ark. App. 47, 539 S.W.3d 619. Here, the circuit court expressly stated that it considered MC1's best interest in modifying custody and that it considered "all of the factors," which necessarily includes an award of joint custody under the statute. As such, Kelley has failed to show reversible error.

IV. *Modification of Custody*

Kelley additionally argues that the circuit court's factual findings were clearly erroneous. She more specifically argues that the circuit court erred in awarding Ryan custody because the evidence presented at trial indicated that MC1 was more recently making As and Bs in school, that she had worked with the school to help MC1, and that she had communicated with Ryan about MC1's care. She acknowledges that her "lifestyle

was as a nurse who worked the night shift and had a few relationships post-divorce.” However, she argued that she provided stability for her children and that the circuit court’s decision—noting that it considered “especially the lifestyle that both of the parties lead”—exhibited the court’s “possible bias against nightshift working.” She further takes issue with the circuit court’s questioning the veracity of her statements that she was able to leave her job at the VA Hospital in Little Rock at 7:00 a.m. and pick up her child from the babysitter, take him home, feed him breakfast, finish getting him ready for school, and have him to school at 8:00 a.m. in Benton. Kelley argues that because the evidence in the record was that MC1 was doing well in school, and in the absence of evidence indicating that she either did not take MC1 to school or that he was tardy, it was clear that the circuit court had made a mistake and that the matter should be remanded. Again, we disagree.

The circuit court laboriously outlined and considered multiple factors in its decision to change custody. The circuit court specifically stated that MC1’s “academics, absences, tardies, and his exposure to three different men” in Kelley’s home were all indicative of a change in circumstances. The circuit court further found that “[w]hen considering all of the factors, especially the lifestyles that both of the parties lead, it is in the best interest of [MC1] that custody be placed with the Plaintiff, Ryan Saunders[.]”

Kelley admitted that she had received truancy letters from the Sheridan School District concerning MC1’s excessive absences. Further, despite Kelley’s claims that MC1 was succeeding in his academics while in her care, MC1’s test results from the Sheridan School District showed that he was “Below Benchmark,” and the student information sheet from the Sheridan School District indicated that he had been pulled out of regular classes

for reading and math. Kristie testified that MC1's recent improvement was the result of the time she and Ryan had spent working with MC1 when he is in their care. There was also evidence of a previous incident in which MC2 had access to a gun that was "pulled . . . on Mr. Manning," Kelley's former husband, while Kelley was at home. MC1 had been left alone under Mr. Manning's care at times while Kelley worked. There was evidence of another relationship that Kelley had with Mr. Green in which Kelley permitted Mr. Green to stay overnight at her home with MC1 present. Additionally, there was evidence presented that MC1 had been given a cell phone by Mr. Wallace, Kelley's current boyfriend who was still married to another woman, that contained a nude photograph of Kelley and other pornographic photographs. Kelley further testified that Mr. Wallace had stayed at her home overnight with MC1 present and that Mr. Wallace has also babysat MC1 at times when Kelley was away. Given our standard of review and the special deference we give circuit courts to evaluate the witnesses, their testimony, and the child's best interest, we cannot say that, under these facts, the circuit court clearly erred in finding that there had been a material change in circumstances and that it was in the best interest of MC1 to change custody from Kelley to Ryan. Accordingly, we affirm.

Affirmed.

GLADWIN and KLAPPENBACH, JJ., agree.

WH Law | We Help, by: *Chris W. Burks*, for appellant.

Robinson, Zakrzewski & Taylor, P.A., by: *Luke Zakrzewski*, for appellee.