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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-21-587

JERROD PIKER APPELLANT V. ANNA PIKER APPELLEE	Opinion Delivered November 30, 2022 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. 63DR-17-373] HONORABLE ROBERT HERZFELD, JUDGE AFFIRMED

BART F. VIRDEN, Judge

Appellant Jerrod Piker appeals from the Saline County Circuit Court's order denying his petition for a modification in custody of the parties' two children. Jerrod argues that the trial court erred in denying his request to share joint custody with the children's mother, appellee Anna Piker. Specifically, Jerrod contends that the trial court erred in finding that there had been no material change of circumstances. We affirm.

I. *Background*

The parties were married in 2004; their daughter was born in 2007; and their son was born in 2011. When the parties divorced in 2017, they agreed that Anna would have full custody of the children. In the discussion of visitation, mention was made in the divorce decree that Jerrod travels for work. In July 2020, Jerrod petitioned for a modification of custody, and he later amended his petition to allege that Anna had been awarded custody of

the children because he "traveled extensively" for work; that there had been a major change in circumstances given that he "no longer travels and now works from home"; and that Anna's work schedule has resulted in the children staying at home alone. Jerrod also alleged that another major change in circumstances was his remarriage, which has brought stability to his home along with a nurturing environment in which to raise the children. The trial court appointed Brooks Wiggins as attorney ad litem, and a hearing on Jerrod's petition was held in August 2021.

At the hearing, Jerrod testified that, at the time of the divorce decree, he agreed to give full custody of the children to Anna because he was traveling 60 percent of the time for work. He testified that he knew he "wouldn't have a case [for joint custody] unless [he] had a change in [his] work situation." Jerrod testified that his previous job had him covering the southern United States and that he accepted a job covering only the state of Arkansas. Jerrod testified, "So now I actually work for the competitive side of the business, so I don't have to travel at all right now. So I'm actually working from home all the time." He insisted that he is at home seven days a week. Jerrod said that, in fact, he has been "grounded from travel" because of the COVID-19 pandemic. Jerrod also stated that he became aware that Anna's work schedule had resulted in the children being at home alone and "fending for themselves." Jerrod agreed with his counsel's characterization that he lives "just a little ways up the road" from the children who are at Anna's home unsupervised.

On cross-examination, Jerrod conceded that he had changed from a regional job to a local job approximately three months after the parties' divorce. He was asked whether he

anticipated traveling for work again in the near future, and he said, “Not anywhere near the extent that I traveled before.” Jerrod then admitted that there would be occasions when he must travel for a conference, which would involve a couple of days in another city. He insisted that such travel would be planned well in advance. Jerrod also stated that there was a possibility that he would not be at home seven days a week but that “[i]t’s not going to be regular travel, I’ll say that.” Jerrod also testified that, whereas he had been living five or six miles from Anna and the children when he initially filed the petition for a modification in custody, he has since moved to North Little Rock, which is approximately a thirty-minute drive from where the children live in Benton.

Anna testified that since the divorce, she had changed jobs but still works within the same county. She stated that the children had also changed schools but that they now attend school closer to where they live. Anna said that, at the beginning of the pandemic, the children were home from school; that she had a “hybrid work schedule” and did not work an eight-hour day; and that she had family and neighbors checking on the children when she was not at home. Anna further testified that, even before the pandemic, her daughter, who is now fourteen years old, would stay at home alone while she ran errands—for perhaps four or five hours at a time.

The parties stipulated to the introduction of a report prepared by Wiggins, who was present at the hearing but did not testify. Wiggins recommended that Anna retain full custody of the children. After hearing the parties’ testimony, Wiggins stated that her recommendation had not changed.

In the report, Wiggins noted that both parents love the children, have a solid work history, are financially stable, and have appropriate residences. Wiggins stated that Anna is engaged to a man whom she has been with for several years who will be a good stepfather and will not interfere with the parties' coparenting of their children. On the other hand, Wiggins wrote that she has "a negative opinion" of Bethany Piker, Jerrod's wife. She described Bethany as "angry, aggressive, controlling" and stated that her text messages to Anna have been "highly inappropriate."

Wiggins noted in the report that, while Anna is patient and open-minded when the children come to her with concerns, Jerrod is narrow minded, "too rigid," and "emotionally immature." She stated that Jerrod seeks "tyrannical control" over the children. She noted that Jerrod's wife is a member of the Pentecostal religion and that Jerrod, who now practices that faith, expects the children to practice that religion in Anna's home, even though Anna takes them to a church of a different denomination. Wiggins wrote that Jerrod is strict with his daughter and has different standards for her versus his stepchildren living in the same home. Wiggins also said that Jerrod is unreasonable when his directives are not followed, going so far as to report to law enforcement and the Arkansas Department of Human Services that his daughter was at Anna's residence alone. The daughter had refused to come to Jerrod's residence when he insisted.

Wiggins wrote in the report that Anna had not limited Jerrod's access to the children but that she did not think Jerrod would cooperate with facilitating Anna's access to the children. Speaking of Jerrod's cooperation, Wiggins stated that Jerrod will not permit Anna

to park her car outside his home for any reason. Wiggins also thought that Jerrod's recent move to another city made joint custody unrealistic. Wiggins stated, "As of right now, [the children] are on a solid path to being awesome, caring adults[,] and that is largely because of [Anna's] parenting of those children." Wiggins also spoke to the children about their preferences. According to Wiggins, they "absolutely do not want joint custody" and "honestly, would like less time with [Jerrod] than they have now, especially in light of Bethany's behavior toward them and [Anna]."

The trial court entered an order denying Jerrod's petition because it found that he had failed to prove a material change in circumstances as per *Nalley v. Adams*, 2021 Ark. App. 167, 625 S.W.3d 336,[1] and *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). The trial court's comments from the bench expand on that ruling, and we will address those comments in the discussion of Jerrod's points on appeal.

II. *Standard of Review*

In reviewing child-custody cases, we consider the evidence de novo but will not reverse a trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Hewett v. Hewett*, 2018 Ark. App. 235, 547 S.W.3d 138. We give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Id.* This deference is even greater in cases involving child custody, as a heavier

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[1]This court's decision in *Nalley* (*Nalley I*) was subsequently overruled and vacated by the supreme court. *See Nalley v. Adams*, 2021 Ark. 191, 632 S.W.3d 297 (*Nalley II*).

burden is placed on the trial court to utilize to the fullest extent its powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id*.

In order to modify a custody decree, the trial court must apply a two-step process: first, the court must determine whether a material change in circumstances has occurred since the divorce decree was entered; second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child's best interest. *Shell v. Twitty*, 2020 Ark. App. 459, 608 S.W.3d 926. Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005). The party seeking modification has the burden of showing a material change in circumstances. *Id*. Factors that are appropriate to consider when determining if there has been a material change of circumstances include, but are not limited to, one parent's relocation, the passage of time, the remarriage of one or both parents, a strained relationship between the parent and child, and the preference of the children. *McCoy v. Kincade*, 2015 Ark. 389, 473 S.W.3d 8. A change in the circumstances of the noncustodial parent *alone* is not sufficient to justify a change of custody. *See Fudge v. Dorman*, 2017 Ark. App. 181, 516 S.W.3d 306.

III. *Discussion*

Jerrod cites *Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003), for the proposition that the trial court may change custody on the basis of major changes in the noncustodial parent's life and only a minor change in the custodial parent's life. According to Jerrod, there have been changes in both parties' lives warranting a modification in custody.

He argues that he no longer travels for work and has remarried, which circumstances combined are a major change in his life, and that Anna's work schedule has left the children at home alone unsupervised—a minor change in circumstances.

We first address Jerrod's remarriage. It is true that remarriage may be considered as a factor in a change-of-circumstances analysis. *Hoover v. Hoover*, 2016 Ark. App. 322, 498 S.W.3d 297. In its ruling from the bench, the trial court urged Jerrod to stop allowing his wife to interfere in the parties' coparenting of their children and warned Jerrod that he could be held in contempt or sanctioned for her behavior. To the extent that the trial court ruled on the materiality of Jerrod's remarriage, that factor appeared to have worked *against* Jerrod in his bid for joint custody.

Regarding the change related to travel for his job, Jerrod argues that the trial court erred in applying "the *Jones* standard." In *Jones*, *supra*, the parties divorced, and the mother was awarded custody of the parties' son. The father later moved for a change of custody on the basis that, among other things, his remarriage—to the woman with whom he had been having an affair—was a material change of circumstances warranting a change of custody. The supreme court held that, given the father's awareness of the relationship with his new wife at the time he entered into an agreement to award custody of the parties' son to his former wife, his remarriage was not a material change of circumstances. The father had also testified that, at the time of the divorce decree, it was within his reasonable contemplation that he would remarry.

Jerrod's focus is on a single sentence from *Jones* in which the supreme court said, in summing up the situation of the father's remarriage, "Stated simply, Dr. Jones cannot use the circumstances he created as grounds to modify custody." *Jones*, 326 Ark. at 491, 931 S.W.2d at 772. That appears to have been the trial court's focus as well.[2] The trial court stated from the bench that it believed Jerrod had made a voluntary job change. Jerrod argues on appeal that the trial court "erred when it concluded that [his] change in employment caused by [the] COVID-19 pandemic was voluntarily created and cannot be used as [a] material change in circumstances."

As a preliminary matter, it was clear from Jerrod's testimony at the time of the hearing in August 2021 that the changed circumstance of no work travel had itself changed in that Jerrod conceded that he was no longer "grounded" from travel because he said that he must still travel for conferences. Regardless of how the change in the frequency or extent of Jerrod's work travel came about—whether Jerrod chose to accept a position with less job travel or whether the pandemic temporarily halted all job travel—the fact that Jerrod traveled *less* for work was a changed circumstance since the time of the divorce decree. To the extent that the trial court relied solely on one sentence from the *Jones* case to conclude that Jerrod failed to carry his burden of proof, we will affirm the trial court when it reaches the right result,

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[2]The trial court also cited our decision in *Nalley I*. That reliance, however, was misplaced given that those parties had been specifically awarded joint custody. In any event, our decision was subsequently overruled by the supreme court in *Nalley II*, which held that the material-change-of-circumstances analysis was not applicable.

even though it may have announced the wrong reason. *Delgado v. Delgado*, 2012 Ark. App. 100, 389 S.W.3d 52.

As noted from the outset of our discussion, Jerrod compares the facts in this case to those in *Mason*. In *Mason*, we held that the trial court did not err in finding that "the radical improvement in [the noncustodial parent's] circumstances, along with the fact that [the custodial parent's] already dismal circumstances had further deteriorated, justified the change in custody to [the noncustodial parent]." *Mason*, 82 Ark. App. at 141, 111 S.W.3d at 859. That case is readily distinguishable. Here, Jerrod has not significantly improved his circumstances in that he travels less for his job than he used to, and he married a woman who interferes with his coparenting of the children he has with Anna. Moreover, Anna's circumstances are far from "dismal" or "deteriorated." *Id*. The trial court remarked from the bench that Anna had done a good job with the children, and Wiggins spoke favorably of Anna's parenting. The trial court noted that Anna had left the children at home alone—a change that Jerrod characterizes as minor—but stated that it is common for a thirteen- or fourteen-year-old child to babysit for far longer periods than four or five hours. The trial court also recognized that the children had spent time at home from school due, in part, to the pandemic but noted that "things had settled down significantly" in that regard.[3] We agree with the trial court's ultimate conclusion that Jerrod failed to prove a material change

[3]The trial court did not mention Jerrod's relocation in its ruling from the bench.

of circumstances sufficient to warrant a modification in custody, considering all of the relevant factors along with Wiggins's report. *McCoy*, *supra*.

Even if Jerrod had proved a material change in circumstances, we would nevertheless affirm the trial court's decision to deny Jerrod's petition. Although it was not necessary to then perform a best-interest analysis after finding that there had been no material change of circumstances, the trial court stated from the bench that it would have denied Jerrod's petition because a modification of custody was not in the children's best interest "particularly based on Ms. Wiggins' report." Jerrod did not object to the report, and he did not seek to question Wiggins on any aspect of her recommendation or the observations she had made about his character. In his brief on appeal, Jerrod broadly asserts that "[i]t is always in the best interest of children to spend time with either parent than alone" and that "[c]hildren need both parents." Considering Wiggins's detailed report and the children's stated preferences, we agree with the trial court that a modification of custody would not have been in the best interest of these children. *Myers v. McCall*, 2009 Ark. App. 541, 334 S.W.3d 878 (recognizing that the preference of the children as to their custodial arrangement is an appropriate factor for a trial court to take into account in determining whether to change custody).

Affirmed.

GRUBER and VAUGHT, JJ., agree.

Stephen A. Shoptaw, for appellant.

Howard Law Firm, PLLC, by: *Lori D. Howard*, for appellee.