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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-21-608

DAVID A. SMITH APPELLANT V. BOBBIE J. SMITH APPELLEE	Opinion Delivered March 1, 2023 APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DISTRICT [NO. 16JDR-20-416] HONORABLE TONYA M. ALEXANDER, JUDGE AFFIRMED

BART F. VIRDEN, Judge

Appellant David Smith appeals from the Craighead County Circuit Court's order granting appellee Bobbie Smith's motion to relocate with, and to change custody of, their two minor children. David argues that there was no material change of circumstances and that the trial court clearly erred in determining that changing custody to Bobbie was in the children's best interest. We affirm.

I. *Background*

The parties married in March 2015 and have two children. On July 21, 2020, they divorced and agreed to share joint custody of their then five-year-old son (MC1) and then three-year-old daughter (MC2) on an alternating-weeks basis. The parties also agreed to make joint decisions with respect to the children's educational and social environment and to

obtain court approval before permanently removing the children from the court's jurisdiction.

In September, Bobbie lost her job with Community Abstract where she had been earning a $40,000 annual salary. On October 2, Bobbie filed an emergency motion to temporarily relocate from Lake City to Bentonville where she had been offered a job. She sought to maintain the joint-custody arrangement. On January 12, 2021, Bobbie modified her earlier petition and requested permission to permanently relocate with the children to Bentonville. She alleged that there had been a material change of circumstances since the divorce in that she had accepted a job offer in Bentonville with an $18,000 salary increase and benefits. She also alleged that David constantly bullied and harassed her; that David had tested positive for illegal drugs; that David's girlfriend often stayed overnight; that the parties disagreed on fundamental issues, including MC1's attendance at preschool during the COVID-19 pandemic; and that she has been the primary caregiver for the children despite the joint-custody arrangement.

At the hearing held in July, Bobbie testified that David had initially told her that the job in Bentonville was a good opportunity for her, that she should "go for it," and that he would "help make it as easy as possible" for her. According to Bobbie, after she had accepted the job in Bentonville, David rescinded his cooperation and began threatening her with contempt. David testified that he did *not* agree to Bobbie's permanent relocation to the other side of the state and losing custody of his children in the process. Bobbie admitted that she had been offered a job in Jonesboro but said that the salary was $40,000 with no benefits.

Bobbie said that in April 2021, she had been transferred from Bentonville to Cabot and that she currently lives in Heber Springs, which is approximately an hour and a half from Jonesboro where David lives.

Bobbie described her relationship with David after the divorce. She said that David thought she should ask his permission before taking the children on overnight trips and before introducing them to the parents of her boyfriend, Chuck Vaughn. Bobbie said that David became angry that she would not host a joint birthday party for MC1, but she explained that it was because of the tense atmosphere and COVID-19 concerns. Bobbie said that David would send her fifty text messages on a subject and that David had posted a photo of MC1 on Facebook with a caption that upset her. David admitted sending many text messages to Bobbie and said that he was not proud of some of the things he had said. He countered that Bobbie had said some unpleasant things to him as well. Bobbie also testified that David had almost gotten into a physical altercation with Chuck during a custody exchange and that David on another occasion had hit and kicked her car. David testified that Chuck had threatened him during the custody exchange.

Bobbie testified that she and David disagreed about whether MC1 should continue attending preschool in person after the start of the COVID-19 pandemic. David filed a motion for contempt against Bobbie when she failed to send MC1 to preschool, but the trial court denied the motion because preschool is not required. Bobbie stated that MC1 is registered to attend kindergarten in Heber Springs—a fact that David testified he learned on the day of the hearing. David testified that Bobbie had taken MC1 to a doctor—Chuck's

father—without clearing it with him first and that MC1 already has a doctor. Bobbie explained that MC1 had gotten sick and that Chuck's father was closer than MC1's regular doctor.

David admitted threatening Bobbie with litigation "quite a bit." Bobbie said that David had brought a defamation case against her accusing her of reporting his drug use to his employer and his banker. She denied having made any report. David testified that in May 2021, he obtained a medical-marijuana card, and he denied accusations that he abused prescription drugs. Bobbie testified that David became irate after she had MC1 tested for COVID-19 because David considered the testing procedure "torture." Bobbie said that David had called her new employer to ask about the employer's COVID-19 policies. David admitted this and also admitted calling the police in January 2021 to do a welfare check when he thought that Bobbie had left their children without a sitter. Chuck testified that Bobbie would become physically ill from the stress of dealing with David. Bobbie testified that she had panic attacks related to the text messaging. Chuck further testified that he had filed a harassment charge against David because David had driven by his house repeatedly and had sent him hundreds of text messages. He said that he blocked David on his phone.

Bobbie testified that she eventually applied for an order of protection against David, that a judge in Northwest Arkansas had entered a mutual no-contact order in February 2021, and that the judge in Northwest Arkansas had warned David that he would go to jail if he continued to harass Bobbie. The no-contact order provided that texting be limited to keeping each other generally informed about the children. Bobbie said that she could "breathe again"

following entry of the no-contact order, and David agreed that relations were much better and calmer after entry of the order. Bobbie testified, however, that David still contacted her too much, and Chuck said that David had repeatedly violated the no-contact order in that he often texted Bobbie about topics not related to the children.

Bobbie testified that she has a four-bedroom, two-bath home in Heber Springs. According to Chuck, that home is owned by his family's estate. Chuck admitted staying overnight with Bobbie while the children were present. Bobbie testified that a family friend's teenage daughter, with support from her family, watches the children while Bobbie is at work. David's seventy-two-year-old mother, Mary Golden, testified that she pays the mortgage on the six-bedroom home in Jonesboro where she lives with David and several of his children. Bobbie said that she has no problem with David's mother caring for the children—but not alone—because Mary has health issues. Mary testified that she had watched MC1 and MC2 while David and Bobbie were still married but admitted that Bobbie's adult sister had been with her when she cared for the children. Brittany Beach, David's former girlfriend and mother of one of his seven children, testified that she had been living with David but that she had since moved out and is in a custody dispute with David over their child. According to Bobbie, MC1 and MC2 are moody when they return from David's care; MC1 regresses with his speech development; and MC2 has nightmares and setbacks with potty training.

In its order granting Bobbie's petition to relocate and for a change of custody, the trial court noted that since taking a higher-paying job in Bentonville, which is a four-hour drive from Jonesboro, Bobbie had been transferred to Cabot and was living in Heber Springs,

which is roughly an hour and a half from Jonesboro. The trial court found that there had been a material change of circumstances due to Bobbie's relocation and noted that David had originally consented to the move and then, without explanation, had withdrawn his consent. The trial court also noted a material change with respect to the parties' ability to communicate regarding the children. The trial court noted that David had sent Bobbie fifty text messages in one day because he did not receive the answer he wanted and that hundreds of similar text messages were referenced during the hearing. The trial court found that David's actions were controlling in nature, which led to Bobbie's filing for an order of protection, and that a mutual restraining order had been entered by a court in Northwest Arkansas. Further, the trial court noted that Bobbie had employed a family friend as a sitter; that MC1 had been enrolled in school; that Bobbie lives in a four-bedroom home with plenty of space for the children; that David has his seventy-two-year-old mother watch the children, yet she has never cared for the children alone; and that David has an adult child and a child with special needs living in his home. The trial court ultimately concluded that it was in the children's best interest to award Bobbie custody.

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. *Ellington v. Ellington*, 2019 Ark. App. 395, 587 S.W.3d 237. Whether the trial court's findings are clearly erroneous turns largely on the credibility of witnesses, and we give special deference to the superior position of the trial court to evaluate

the witnesses, their testimony, and the child's best interest. *Id.* There are no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving minor children. *Id.*

Arkansas law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Schreckhise v. Parry*, 2019 Ark. App. 48, 568 S.W.3d 782. Generally, courts impose more stringent standards for modifications of custody than they do for initial determinations of custody. *Id.* The reason for requiring more stringent standards for modifications than for initial custody determinations is to promote stability and continuity in the life of the child and to discourage repeated litigation of the same issues. *Id.* The party seeking modification of the custody order has the burden of showing a material change in circumstances. *Id.* When a change of custody is sought in a joint-custody arrangement, the trial court must first determine that a material change in circumstances has transpired from the time of the divorce decree; if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the children. *Singletary v. Singletary*, 2013 Ark. 506, 431 S.W.3d 234.

III. *Discussion*

A. Material Change of Circumstances

David argues that Bobbie's relocation was not a material change of circumstances and that Bobbie failed to show that joint custody was impossible. David cites *Singletary*, *supra*, and *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002), for the proposition that Bobbie

was required to prove that the joint-custody arrangement was impossible. Those cases, however, do not stand for that proposition; the courts did recognize the impracticability of sharing true joint custody when there are school-aged children involved. Here, Bobbie relocated, first to Bentonville and then to Heber Springs, which is nearly two hours from Jonesboro. The trial court noted that, had the children been younger, the parties' week-on/week-off arrangement might have worked but that the children are approaching school age. We agree that Bobbie's relocation made maintaining joint custody impractical given the children's ages.

David also argues with respect to Bobbie's relocation that Bobbie cannot use a voluntary circumstance that she herself created to modify custody. According to David, *Jeffers v. Wibbing*, 2021 Ark. App. 239, and *Davenport v. Uselton*, 2013 Ark. App. 344, are "fatal" to the trial court's relocation finding. Those cases are distinguishable in that neither involved a joint-custody arrangement. In *Jeffers*, the noncustodial father moved closer to the child and unsuccessfully sought to use his relocation as a self-created changed circumstance to modify custody to joint custody. In *Davenport*, the custodial father had moved farther away with his children and unsuccessfully attempted to use his voluntary relocation as a changed circumstance to modify the mother's visitation. Here, Bobbie's decision to relocate approximately two hours away from David was a voluntary decision, but the trial court found that her relocation for a higher-paying job with benefits was valid after she had lost her job in Jonesboro. David is correct that relocating in order to obtain employment *itself* does not constitute a material change in circumstances. *Gerot v. Gerot*, 76 Ark. App. 138, 61 S.W.3d

890 (2001). Bobbie's relocation, however, was not the sole reason for finding that a material change of circumstances had occurred. Tensions between David and Bobbie had escalated since entry of the divorce decree. The trial court saw David's behavior as "controlling," and the evidence showed that the parties' relationship and their ability to communicate with each other had deteriorated such that a no-contact order was necessary. Joint custody has traditionally been premised on the mutual ability of the parents to cooperate in decisions that affect the child's welfare. *Lewellyn*, *supra*. Although David asserts that the parties' communication problems had been "resolved" by the time of trial with the entry of the no-contact order, the trial court apparently disagreed. While Bobbie testified that the communications were calmer, she stated that David still contacted her too often. Also, Chuck said that David's texts to Bobbie were not always about the children. We cannot say that the trial court clearly erred in finding that a material change in circumstances had occurred since the divorce decree given Bobbie's relocation and the parties' inability to coparent because of communication difficulties.

B. Best Interest of the Children

David next argues that the trial court erred in determining that a change of custody was in the children's best interest. David asserts that the trial court's rationale was that his home is "less appropriate than Bobbie's." He points out that he owns an interest in his home, whereas Bobbie will be homeless if her relationship with Chuck ends; that his mother was an appropriate caregiver for the children before and after the divorce; that the presence of half siblings favors placement of MC1 and MC2 in his home given that the older half siblings

could assist with their care; that the educational opportunities and speech therapy were appropriate in Jonesboro, while there was virtually no evidence of the opportunities available in Heber Springs; and that, although Bobbie took a well-paying job, she testified that she is living paycheck to paycheck.

While David makes some compelling distinctions between the parties' situations, he is essentially asking us to second-guess the trial court's determination as to the weight of the evidence and the credibility of the witnesses. The trial court considered the testimony related to the distinctions pointed out by David on appeal, but we, as the reviewing court, cannot reweigh the evidence to favor David's position. *Raymond v. Kuhns*, 2018 Ark. App. 567, 566 S.W.3d 142. Given our standard of review and the special deference we give trial courts in child-custody cases, we cannot say that the trial court clearly erred in determining that awarding custody to Bobbie was in the best interest of MC1 and MC2.

Affirmed.

HIXSON and MURPHY, JJ., agree.

Blair & Stroud, by: *Barrett S. Moore*, for appellant.

Taylor & Taylor Law Firm, P.A., by: *Tory H. Lewis*, *Andrew M. Taylor*, and *Tasha C. Taylor*, for appellee.