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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-22-382

	Opinion Delivered October 4, 2023
MARY GRAYSON APPELLANT	APPEAL FROM THE BOONE COUNTY CIRCUIT COURT [NO. 05DR-16-237]
V.	HONORABLE JOHNNIE A. COPELAND, JUDGE
CHRISTOPHER ANDERSON APPELLEE	AFFIRMED IN PART; REVERSED AND REMANDED IN PART

BART F. VIRDEN, Judge

Appellant Mary Grayson appeals from the Boone County Circuit Court's order denying her petition for a change of custody with respect to the parties' older daughter, Minor Child 1 (MC1), and awarding custody of the parties' younger daughter, Minor Child 2 (MC2), to appellee Christopher Anderson. Grayson argues that the trial court erred by not making a specific finding that Anderson, who is a sex offender, posed no danger to the children and for placing the burden of proving that on her. Grayson also argues that Anderson did not rebut the presumption in Ark. Code Ann. § 9-13-101(d) (Supp. 2023) that it is not in the best interest of a child to be placed in the custody of a sex offender and that there was no evidence on which to have found the presumption had been rebutted. We

affirm the trial court's order as to MC1, but we reverse and remand for specific findings as to MC2.

I. *Background*

The parties divorced in 2017, and Anderson was awarded custody of MC1, born in 2013. The parties reconciled before entry of the divorce decree; they conceived MC2, born in 2018; and they continued to live together as a family until March 2020 when the parties separated permanently. Anderson initially took both MC1 and MC2 and relocated with them; however, he soon returned MC2 to Grayson.[1] According to Anderson, he returned MC2 because Grayson had threatened him with kidnapping charges.

In April 2020, Grayson filed an emergency petition for temporary and permanent change of custody with respect to MC1. She alleged a material change of circumstances in that the parties had lived together for several years after the divorce with Grayson being the primary caregiver of MC1; that Anderson plans to relocate with MC1, possibly out of state; and that Anderson is a convicted sex offender having been convicted of fourth-degree sexual assault. Anderson denied the allegations and requested custody of MC2.

[1]When a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until he or she reaches eighteen years of age unless a court of competent jurisdiction enters an order placing the child in the custody of another party. Ark. Code Ann. § 9-10-113(a) (Repl. 2020).

At a hearing, relevant to the arguments presented here, Anderson testified that he had been convicted of third-degree sexual assault, a Class B felony,[2] after a jury trial in 2009—before the parties married. He stated that he spent two years in prison and must now register as a level-two sex offender. Anderson admitted that he had since pled guilty to a misdemeanor in connection with failing to register.

Following the hearing, the trial court took the matter under advisement. Later, the trial court entered an order ruling that Anderson would retain custody of MC1 and awarding custody of MC2 to Anderson. The trial court recognized that the determination of custody for each child must be analyzed under different standards. With regard to MC1, the trial court found that the "living arrangements significantly changed" and that Anderson had relocated to North Little Rock. The trial court then found that Grayson had failed to rebut the presumption that Anderson's relocation was in MC1's best interest. As for MC2, the trial court treated her situation as an initial custody determination. In concluding that it was in the best interest of both MC1 and MC2 to be with Anderson, the trial court found, in relevant part, that

> [t]hose circumstances [involving Anderson's sex-offender status] existed well before the parties married and decided to have children. There was no evidence presented at trial of the nature of Mr. Anderson's sex crimes or the identification of his victim(s). This can only mean that they are not of significance to Ms. Grayson or that they are not pertinent to his care for the girls.
>
> An examination of Ms. Grayson's living, working, and transportation situation is more troubling. Every day she takes a chance in her child watching her be arrested

[2]Ark. Code Ann. § 5-14-126 (Supp. 2007).

> for driving without a driver's license.[3] It is impossible at this time for her to provide transportation for the children in a lawful manner.
>
> It does not seem that Ms. Grayson is able to keep [MC2] to a schedule appropriate for her age. Her admission to being under the influence of marijuana in the presence of the children is troubling. It is commendable that she has done well with her employment, however that employment would necessitate that the children stay with babysitters for long periods late into the night.
>
> When residing as a family, it does not seem like either party placed an emphasis on the children's education. This is best shown by the fact that [MC1] had to repeat the first grade when she was finally enrolled back in school in North Little Rock. Neither of these parents has been ideal. It does seem however that dad is better equipped and prepared to parent these two children. . . .

II. *Standard of Review*

In reviewing child-custody cases, we consider the evidence de novo, but we will not reverse a trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Smith v. Smith*, 2023 Ark. App. 108, 661 S.W.3d 273. The question whether the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, and we give special deference to the superior position of the trial court to evaluate the witnesses, their testimony, and the children's best interest. *Goodman v. Goodman*, 2019 Ark. App. 75. The trial court's conclusion on a question of law, however, is given no deference on appeal. *Oates v. Oates*, 2010 Ark. App. 346. Furthermore, this court reviews issues of statutory interpretation de novo. *Stormes v. Gleghorn*, 2022 Ark. App. 416, 653 S.W.3d 820.

[3]Grayson testified that she has not had a driver's license since 2011.

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. *Ingle v. Dacus*, 2020 Ark. App. 490, 611 S.W.3d 714. Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Id.*

III. *Discussion*

Arkansas Code Annotated section 9-13-101(d) provides the following:

> (1) If a party to an action concerning custody of or a right to visitation with a child is a sex offender who is required to register under the Sex Offender Registration Act of 1997, section 12-12-901 *et seq.*, the circuit court may not award custody or unsupervised visitation of the child to the sex offender unless the circuit court makes a specific finding that the sex offender poses no danger to the child.
>
> (2) There is a rebuttable presumption that it is not in the best interest of the child to be placed in the care or custody of a sex offender or to have unsupervised visitation with a sex offender.

Grayson argues that the trial court failed to make a specific "no danger" finding and did not address the underlying best-interest presumption pursuant to the statute. She further argues that the trial court improperly shifted the burden of proving no danger and best interest to her. According to Grayson, it was incumbent on Anderson to present affirmative proof on these matters. Grayson points out that section 9-13-101(d)'s public policy was expressed in *Peck v. Peck*, 2009 Ark. App. 731, in which we said that the statute does evince a legislative policy that is opposed to children living in the home of a sex offender.

A. MC1: Modification of Custody

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.

In *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), the supreme court held that the relocation of the custodial parent and children is not, by itself, a material change in circumstances justifying a change in custody and that a presumption exists in favor of relocation for custodial parents with primary custody, with the burden being on the noncustodial parent to rebut the relocation presumption. Determining whether there has been a change of circumstances requires a full consideration of the circumstances that existed when the last custody order was entered in comparison to the circumstances at the time the change of custody is considered. *Geren Williams v. Geren*, 2015 Ark. App. 197, 458 S.W.3d 759.

Grayson appears to recognize that Anderson's sex-offender status is not a material change of circumstances given that he was a sex offender before the parties married and had children and before Anderson was awarded custody of MC1 in the 2017 divorce decree. Grayson instead argues that the requirement of a material change of circumstances "should be subordinate to the safety concerns implicated by the legislature's clear determinations regarding sex offenders, their propensity to reoffend, and the potential danger to the children." Grayson, however, cites no authority for this proposition. We will not address an argument that is not supported by any legal authority. *Baggett v. Benight*, 2022 Ark. App. 153, 643 S.W.3d 836. In any event, the trial court *did* find a material change of circumstances

here considering both the drastic change in living arrangements, which resulted in the separation of the siblings, and Anderson's relocation nearly three hours away.

Since entry of the divorce decree in 2017, Grayson and Anderson had reconciled, had another child, MC2, and continued to live together as a family for approximately three years. Then, the parties separated again, and Anderson moved away. Anderson maintained the court-ordered custody of MC1, and Grayson had custody of MC2. In other words, the siblings were separated and subject to what was effectively a split-custody arrangement implemented by the parties. This evidence, considered as a whole, demonstrates a material change of circumstances; however, the trial court determined that it was not in MC1's best interest to change custody from Anderson to Grayson.

The trial court found that Grayson "did not present evidence to overcome [the relocation] presumption," which Grayson does not contest. In fact, the trial court found that MC1 is "living in a more structured environment and doing well in school." The trial court further found that Anderson was "better equipped" to parent MC1. Also, we note that for the past six years, since entry of the divorce decree in 2017, Anderson has had custody of MC1, and the record does not contain any evidence of improper sexual conduct. Finally, the best-interest presumption in section 9-13-101(d)(2) does not apply to Grayson's request for modification of custody because MC1 had already been placed with Anderson pursuant to the 2017 divorce decree, and Grayson did not appeal that decision. We cannot say that the trial court clearly erred in denying Grayson's petition for modification of custody; therefore, we affirm the order as to MC1.

B. MC2: Initial Custody Determination

In the absence of a statute or rule requiring specific findings of fact or a timely request for specific findings under Ark. R. Civ. P. 52, we will ordinarily presume that the trial court made the findings necessary to support its judgment. *Watkins v. Adams*, 2021 Ark. App. 248, 627 S.W.3d 430. Here, however, the statute requires a specific finding that there was no danger in awarding custody of MC2 to Anderson as a result of his status as a sex offender. We acknowledge that the trial court did address Anderson's sex-offender status generally when it granted Anderson custody of MC2. The order provides in relevant part that

> [t]here are some concerns in the Court's mind regarding Mr. Anderson's incompliance in the past with the requirement that he register as a sex offender, and about his ability to interact with [MC1]'s school because of his status as a Level 2 sex offender. [Footnote omitted]. However, those circumstances existed well before the parties married and decided to have children. There was no evidence presented at trial of the nature of Mr. Anderson's sex crimes or the identification of his victim(s). This can only mean that they are not of a significance to Ms. Grayson or that they are not pertinent to his care for the girls.

While the trial court indicated that Anderson's sex crimes, i.e., his sex-offender status, "are not of a significance to Ms. Grayson or that they are not pertinent to his care for the girls," we hold that this finding does not satisfy the explicit requirement of section 9-13-101(d)(1) that the court must "make a specific finding that the sex offender poses no danger to the child." Thus, we remand for the trial court to determine whether Anderson poses no danger to MC2.

We cannot do as Anderson suggests and hold that the trial court impliedly made this finding. *See, e.g.*, *Decay v. State*, 2013 Ark. 185 (reversing and remanding for entry of a written

order containing specific findings of fact and conclusions of law as required under Ark. R. Crim. P. 37.5(i)); *Ark. State Bd. of Licensure for Pro. Surveyors v. Callicott*, 2016 Ark. App. 476, 503 S.W.3d 860 (recognizing that the Administrative Procedure Act requires that an administrative adjudication be accompanied by specific findings of fact and conclusions of law in accordance with Ark. Code Ann. § 25-15-210). Likewise, we cannot do as Grayson requests. She asserts that we should simply reverse and grant her custody, but that would require us to act as a fact-finding body. *See Gerking v. Hogan*, 2015 Ark. App. 678, 476 S.W.3d 863 (noting that de novo review does not mean that the findings of fact of the circuit court are dismissed out of hand and that the appellate court becomes the surrogate trial judge). We thus reverse and remand for a specific finding on whether Anderson posed no danger to MC2, given that he is a sex offender.

A statutory presumption is a rule of law by which the finding of a basic fact gives rise to the existence of a presumed fact, unless sufficient evidence to the contrary is presented to rebut that presumption. *Curt Bean Transp., Inc. v. Hill*, 2009 Ark. App. 760, 348 S.W.3d 56. A presumption imposes on the party *against whom it is directed* the burden of proving that the nonexistence of the presumed fact is more probable than its existence. Ark. R. Evid. 301. Therefore, on remand, the burden is on Anderson to rebut the presumption against his having custody.[4] The trial court must consider MC2's best interest in light of the

[4]We express no opinion on the propriety of the trial court's having awarded custody of MC2 to Anderson or to the trial court's best-interest finding. Before that analysis, the trial court must make the specific finding required by the statute.

presumption in section 9-13-101(d)(2).[5] We thus reverse and remand the trial court's order as it pertains to MC2 for specific findings and a proper best-interest analysis.

Affirmed in part; reversed and remanded in part.

ABRAMSON and HIXSON, JJ., agree.

Jeremy B. Lowrey, for appellant.

Mann & Kemp, PLLC, by: *Angela Mann*, for appellee.

[5]Grayson argues that Anderson was also required to make a showing pursuant to Ark. Code Ann. § 9-10-113(c) (Repl. 2020); however, we do not address arguments raised for the first time in a reply brief. *Elliott v. Skaggs*, 2013 Ark. App. 720, 430 S.W.3d 837.