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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-22-595

NATHAN NICHOLSON

APPELLANT

V.

ASHLEY MATHENY

APPELLEE

Opinion Delivered October 25, 2023

APPEAL FROM THE SHARP COUNTY
CIRCUIT COURT
[NO. 68DR-11-55A]

HONORABLE MICHELLE C. HUFF,
JUDGE

AFFIRMED

WENDY SCHOLTENS WOOD, Judge

Nathan Nicholson appeals the Sharp County Circuit Court’s April 27, 2022 order denying his petition for modification of custody of his minor child (MC). Nathan argues that the circuit court erred in finding that he failed to prove a material change in circumstances. We affirm.

Nathan and Ashley Matheny¹ were married on March 30, 2008, and their daughter, MC, was born on December 24, 2009. When Nathan and Ashley divorced in August 2012, the divorce decree entered by the circuit court awarded primary custody of MC to Ashley and standard visitation to Nathan. The decree included, among other things, a proper-

¹At the time of the hearing, Ashley testified that her last name is Taylor (her maiden name).

conduct clause that prohibited the parties from “expos[ing] [MC] to any person with whom [they] may be living unless . . . married to that person.”

A week after the decree was entered, Nathan moved to modify and set aside the divorce decree and sought primary custody of MC. Nathan alleged that Ashley had allowed a man to whom she was not married, Britten South, to stay in her home while MC was present and had perpetrated a fraud on the court by falsely testifying in the divorce proceedings that she had not had an affair with Britten. Attached to the motion was an affidavit from an investigator who averred that, based on his surveillance, it appeared that Ashley and Britten lived together while Ashley had custody of MC. Thereafter, Ashley moved for contempt against Nathan alleging numerous violations of the visitation, communication, proper-conduct, and child-support provisions in the decree.

On June 10, 2013, the circuit court dismissed Nathan’s motion to modify and set aside the divorce decree. On September 5, the circuit court ordered that Ashley maintain primary custody of MC. The court further found that Nathan was working out of state on a regular basis and modified the parties’ visitation schedule to accommodate Nathan’s out-of-state work and shifting locations. The court also increased his child-support obligation, found him in arrears, and restated the proper-conduct clause precluding the parties from exposing MC to any person with whom the parent was living outside of marriage.

On May 21, 2021, Nathan petitioned the circuit court for a change in custody, alleging that a material change in circumstances had arisen since entry of the September 5, 2013 order. Nathan again alleged that, while MC was present in the home, Ashley had

allowed overnight visits with men to whom she was not married. In addition, he alleged that Ashley drank alcohol and used marijuana in the presence of MC, disciplined MC by striking her with a hairbrush, and removed MC from extracurricular sports activities. Ashley answered the petition and filed a counterclaim seeking a finding of contempt. She alleged that Nathan had failed to provide health insurance for MC, disparaged Ashley in MC's presence, and was in arrears in child support.

At a two-day hearing held on February 2 and March 15, 2022, the evidence showed that Ashley had been MC's primary caregiver since she was born and that MC was twelve at the time of the hearing and attended school in Cave City. MC spent every other weekend at Nathan's home in Melbourne. She enjoyed spending time there and wanted to live with her father and go to school in Melbourne. MC excelled at gymnastics and other sports, and Nathan regularly drove her to and from gymnastics practice and meets.

Witnesses consistently described MC as happy, intelligent, articulate, and athletic, but she also could have an "attitude" and had developed "preteen" behaviors, including back talking and eye rolling. Ashley had disciplined her for such behavior in the past and said Nathan was aware of the problem but would not discipline MC. For example, there was testimony that in October 2020, Ashley disciplined MC after MC had "mouthed off" to her. Ashley said she happened to have a hairbrush nearby, and she gave MC "two or three licks" with it. MC reported the issue, and DHS investigated but found the abuse allegations

unsubstantiated. As part of its investigation, DHS gave Ashley two drug tests, both of which tested negative for marijuana.²

Another example occurred in February 2021, when MC messaged a teacher from home and reported that there was an emergency at home. School officials contacted police, who performed a welfare check. Afterward, Ashley disciplined MC by depriving her of visitation with Nathan for one weekend, suspended her from sporting activities, and made her apologize to the teachers at school for having lied to them and caused them unnecessary worry.

The following week, while Ashley was recovering from surgery, Sandra asked MC to help feed the horses. Ashley said MC was mad, did not want to feed the horses, slammed the door, and was “hollering” about how unfair it was that she had to help. Ashley said that she disciplined MC for the incident by taking away her cell phone. Ashley informed Nathan by text that MC’s phone had been taken and that he could reach her on Ashley’s phone. She further told him that MC would not be attending gymnastics or basketball the rest of the year. Ashley told Nathan that he could call her phone when he wanted to talk to MC but that “the calling and texting every day needs to stop.” Ashley explained that MC had lost her privileges because she had lied about what happened both times that authorities had been called to the home. She further testified that

²The first test showed a positive result for opiates. Ashley and her mother, Sandra Taylor, testified that Ashley had taken a prescription pill for pain in her lower back that later required two surgeries. This testimony was unrefuted at trial.

anytime you ask her to do something, she throws a fit. Not only did she lie about me beating her back in October, but then she did it again last Monday. It is not okay that she had those teachers worried for her safety. It is not okay for her to throw fits and be disrespectful because she gets mad when she gets in trouble. That is unacceptable. She will not grow up being a person that lies and cries wolf. I will not raise a child that lies, steals, and becomes a burden to society. I will not turn her into a person who thinks that she is entitled to everything when she has done nothing to deserve it.

Nathan testified that when Ashley disciplined MC by denying him visitation, he summoned police to Ashley's home to perform another welfare check. It was recorded on an officer's body camera, and the video and a transcript of the video were introduced at the hearing. The officer arrived and confirmed with MC that she was okay. The officer also indicated to Ashley that he was there because Nathan had reported that Ashley had taken MC's cell phone and had prevented Nathan's weekend visitation with MC. Ashley explained to the officer that she had had a couple of surgeries, that MC was "being hateful, not wanting to help" with chores, and that she had disciplined her by taking her cell phone. Ashley further explained that earlier in the week, MC had untruthfully reported to teachers that there was an emergency at home and that things had "escalated" from there with Nathan. The officer left without further action.

MC testified about the incidents in October 2020 and February 2021. She said her mother had hit her with the hairbrush more than once, that she had reported the incidents, and that she apologized to the teachers about the report she made to the school because she had been threatened by her mother's best friend, Amber Muston, to do so and that her mother had put Amber up to it. She testified that she wanted to live with her father.

MC then testified about several photographs that she had taken of what appeared to be marijuana and a pipe. She said she found them in a camper that she and Ashley had temporarily stayed in on Sandra's property when Ashley was divorcing her second husband, Jeremy Matheny. MC said she did not know it was marijuana until she showed the pictures to Nathan. She said she took the photos "so I could have something against her to prove that she is actually a bad mom" and "wanted to have some evidence against her" so that she "wouldn't have to live with her anymore." She further testified that she had never seen her mother smoke marijuana.

MC also testified that Ashley's boyfriend, Tyler Hunt, had stayed overnight in their home while MC was present. She said Tyler lives in Mississippi but stays with Ashley, MC, and Sandra when he comes to visit on weekends. MC testified that she and her mother stay in a hotel room when they go to Mississippi to visit Tyler, and on other occasions when they traveled with Tyler, they stayed in a hotel with him, but he stayed in a separate room.

Tyler testified that he lives in Mississippi with his two children who are fourteen and fifteen years old. He stated that he and Ashley had been dating for nearly three years and that he visits her on weekends. He also testified that when he travels with Ashley and MC, they stay in a separate hotel room. Ashley testified that Tyler had stayed the night with her, MC, and Sandra approximately fifty times before May 2021 when Nathan petitioned to change custody. She testified that Tyler has a full-time job in Mississippi and stays with her on weekends.

Finally, Nathan and MC testified about journal entries MC had made. In them MC called her mother “Trashley” and “Devil,” names Nathan had also used for Ashley. The entries also stated that Ashley was abusive and had removed MC from gymnastics, that MC wanted to give up, and that she would slit her wrists “right then and there” if her mother got custody of her because MC then will have nothing—“no sports” and “no scholarships.” Testimony indicated the journal entries, some of which were dated before the first day of the hearing, had been authored between the two hearing dates.

At the close of the hearing, the circuit court ruled from the bench, finding by a preponderance of the evidence that there had been no material change of circumstances and that there was no need to make a best-interest determination. The court found that the testimony demonstrated that, while MC is smart, articulate, and strong-willed, she is also a twelve-year-old girl who needs stability. The court noted that MC’s journal entries were “very self-serving for [MC] and what . . . she wants” and disregarded them. It expressed concern, however, about the mention of suicide in MC’s journal entries and encouraged counseling for her and the family. The court further noted Ashley’s strength and composure during the difficult testimony she was hearing for the first time from MC. The court found that Ashley had not abused MC and that there had been no illicit drug use by Ashley in MC’s presence. And although the court initially questioned Ashley’s judgment in ending gymnastics as a form of punishment for MC, it said that when it heard Ashley’s rationale for the decision and learned that MC was playing softball and basketball shortly thereafter, it made sense to the court considering MC’s age and circumstances. The court further considered that

Nathan did not think MC needed punishment for her conduct, while Ashley expressed concern for MC's growth and explained that her disciplinary decisions were intended to ensure MC's proper development and credibility. Finally, with respect to the proper-conduct clause, the court considered the case law cited by Nathan along with the language of the clause, and it concluded the conduct of Ashley and Tyler did not violate the clause because they were not living together. The court concluded that MC "requires stability and [Ashley] has provided her with that stability." The court reduced its oral findings to a written order that was entered on April 27, 2022. This appeal followed.

When reviewing domestic-relations cases, this court considers the evidence de novo. *Wadley v. Wadley*, 2019 Ark. App. 549, at 2, 590 S.W.3d 754, 756. It will not reverse the circuit court's findings, however, unless they are clearly erroneous. *Id.*, 590 S.W.3d at 756. A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been committed. *Williams v. Williams*, 2019 Ark. App. 186, at 14, 575 S.W.3d 156, 163. Whether the circuit court's findings are clearly erroneous turns largely on the credibility of the witnesses, and the court gives special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interest. *Id.*, 575 S.W.3d at 163. 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. *Dodd v. Gore*, 2013 Ark. App. 547, at 5.

While a circuit court retains jurisdiction to modify an initial custody award, the standard for modification is more stringent than it is for the initial determination. *Powell v.*

Marshall, 88 Ark. App. 257, 265, 197 S.W.3d 24, 28–29 (2004). A party seeking to modify custody must prove that a material change of circumstances has occurred since the last order of custody or that material facts were unknown to the court when the decree was entered. *Evans v. McKinney*, 2014 Ark. App. 440, at 4, 440 S.W.3d 357, 359. If that threshold requirement is met, the court must then determine who should have custody with the sole consideration being the best interest of the child. *Id.*, 440 S.W.3d at 359. If the threshold requirement of a material change in circumstances is not met, there is no need for a best-interest finding. *Ellington v. Ellington*, 2019 Ark. App. 395, at 5, 587 S.W.3d 237, 241. The reason for requiring this more stringent standard for modifying custody is to promote stability and continuity in the life of the child and to discourage repeated litigation of the same issues. *Powell*, 88 Ark. App. at 265, 197 S.W.3d at 29.

On appeal, Nathan argues that the circuit court’s finding of no material change in circumstances was clearly erroneous because Ashley violated the proper-conduct clause in the circuit court’s September 2013 order. He contends that the proof overwhelmingly demonstrates that Ashley allowed men to whom she was not married to stay overnight in the home while MC was present. He notes that, in addition to testimony from other witnesses, Ashley testified that she had allowed Tyler to stay overnight in her home on more than fifty

occasions while MC was present.³ He claims this “unrefuted fact, alone, constitutes a material change in circumstances under Arkansas law.”

We first note that custody awards are not to be modified for the purpose of punishing, rewarding, or gratifying the desires of either parent. *Powell*, 88 Ark. App. at 266, 197 S.W.3d at 29. A violation of a circuit court’s previous orders does not compel a change in custody. *Id.*, 197 S.W.3d at 29. The violation is a factor to be taken into consideration, but it is not so conclusive as to require the court to act contrary to the child’s best interest. *Id.*, 197 S.W.3d at 29. “To hold otherwise would permit the desire to punish a parent to override the paramount consideration in all custody cases, i.e., the welfare of the child involved.” *Id.*, 197 S.W.3d at 29 (citing *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003)). Instead, to ensure compliance with its orders, a trial court has at its disposal the power of contempt, which should be used prior to the more drastic measure of changing custody. *Id.*, 197 S.W.3d at 29. Nathan did not seek a contempt finding.

The circuit court considered all of Nathan’s allegations that he claimed supported a material change in circumstances: Ashley violated the proper-conduct clause by allowing overnight visits with men to whom she was not married, Ashley drank alcohol and used marijuana in the presence of MC, Ashley disciplined MC by striking her with a hairbrush, and Ashley removed MC from extracurricular sports activities. The court found that Nathan

³Ashley further testified that several years before the modification hearing, she and MC had lived with Jeremy Matheny before marriage. (They subsequently divorced.) In his argument on appeal, however, Nathan focuses on Ashley’s conduct with Tyler.

proved none of them. Pertinent to this appeal, the circuit court found that Ashley did not violate the proper-conduct clause because she and Tyler were not living together. The evidence supports this finding. The testimony was undisputed that Tyler works and lives in Mississippi with his two teenage children. According to Ashley, MC, and Tyler, he visits on weekends. Further, MC and Tyler testified that MC and Ashley stay in a hotel when they go to Mississippi to visit Tyler, and on other occasions when they had traveled with Tyler, they stayed in separate hotel rooms. Considering this testimony, we cannot say that the circuit court clearly erred in finding that Ashley did not violate its order regarding living with persons outside of marriage.

Nathan asks us to reverse the circuit court's finding that Ashley did not violate the proper-conduct clause because Ashley testified at the hearing that she allowed Tyler to stay overnight at least fifty times. Ashley did acknowledge she had "lived with" Tyler. But contrary to Nathan's argument, we do not find her testimony dispositive of the allegation that she violated the proper-conduct clause. All of the evidence on this matter, which includes testimony from Ashley, Tyler, and MC, indicates that Tyler regularly visited Ashley (and MC) on weekends. The evidence was also undisputed that Tyler lives in Mississippi with his two children. This evidence supports the circuit court's finding that Ashley did not violate the proper-conduct clause despite her statement that she "lived with" Tyler.

Relying on *Wadley v. Wadley*, Nathan further contends that "extramarital cohabitation in the presence of children 'has never been condoned in Arkansas, is contrary to the public policy of promoting a stable environment for children, and may of itself constitute a material

change of circumstances warranting a change of custody.” 2019 Ark. App. 549, at 5–6, 590 S.W.3d at 758–59 (quoting *Alphin v. Alphin*, 364 Ark. 332, 341, 219 S.W.3d 160, 165–66 (2005)). The circuit court acknowledged Nathan’s reliance on *Wadley*, in which this court affirmed a material-change finding based in part on the father’s entertainment of overnight romantic guests. *Id.*, 590 S.W.3d at 758–59. The proper-conduct clause in *Wadley*, however, specifically provided that “[n]either party shall allow overnight romantic guests during their custodial time with the child.” *Id.* at 5 n.2, 590 S.W.3d at 758 n.2. Unlike the order in *Wadley*, the order in the case at bar does not prohibit overnight guests; it prohibits the parties from *living with* someone to whom they are not married.

In sum, we cannot say that the circuit court clearly erred in finding that Ashley did not violate the proper-conduct clause because she was not living with Tyler. We note that this is one of several other findings that the circuit court made in support of its conclusion that there had been no material change of circumstances. The circuit court also found that Ashley had not abused MC, Ashley had not engaged in illicit drug use in MC’s presence, and Ashley’s decision to temporarily remove MC from sports had been appropriate, and Nathan does not challenge these findings on appeal. The failure to challenge a circuit court’s findings on appeal constitutes a waiver or abandonment. *Uttley v. Bobo*, 97 Ark. App. 15, 19, 242 S.W.3d 638, 642 (2006). Taking all of the circuit court’s findings together, we conclude that the circuit court did not clearly err in finding that Nathan failed to demonstrate the existence of a material change in circumstances.

Finally, in his opening brief, Nathan cites MC's testimony explaining why she wanted to live with him instead of Ashley and argues that it is in MC's best interest to modify custody. Because we hold that the circuit court did not err in finding there had been no material change in circumstances, we do not address best interest. *Ellington*, 2019 Ark. App. 395, at 5, 587 S.W.3d at 241 (stating where there is no material change in circumstances sufficient to support a change of custody, there is no need to address best interest).⁴

Affirmed.

MURPHY and BROWN, JJ., agree.

Castleberry Law Firm, PLLC, by: *Kenneth P. "Casey" Castleberry*; and *Murphy, Thompson, Arnold & Skinner*, by: *Tom Thompson*, for appellant.

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

⁴In his reply brief, Nathan acknowledges that the circuit court did not make a best-interest finding and asks this court to reverse the material-change-in-circumstances finding and remand to the circuit court for a best-interest finding.