577-0460
TO: Greg Forman

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Norris Samuel Law, III, Respondent,

v.

Penny Jean Morris Law, Appellant.

Appeal From Berkeley County
Robert R. Mallard, Family Court Judge

Unpublished Opinion No. 2004-UP-155
Heard February 11, 2004 – Filed March 9, 2004

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

David L. DeVane, of Charleston, for Appellant.

Margaret D. Fabri, of Charleston, for Respondent.

PER CURIAM: Norris Samuel Law, III (Father) brought an action against Penny Jean Morris Law (Mother) alleging several changes in circumstances that would justify a change in custody of their daughter. The family court judge granted custody to Father with visitation to Mother every other weekend, alternating holidays, and one month in the summer. Mother appeals. We affirm in part, reverse in part, and remand.

FACTS

Mother and Father separated in June of 1997 and entered into an agreement concerning the custody of their then two-year-old daughter, Grayson. The agreement provided they would share joint legal custody of Grayson, with Mother having primary physical custody and Father having secondary physical custody with "liberal rights of visitation." The parties also agreed that neither Mother nor Father would have the minor child in their home if a paramour was visiting overnight. The parties divorced in September of 1997 and incorporated the agreement into their final decree of divorce.

At some time near the end of 1997, Father began living with his girlfriend, Jennifer, whom he married in January 1999. Mother also began living with her boyfriend, Jason Belcher, during 1997. Mother later married Mr. Belcher on August 22, 2000. From 1997 to August 2000, Mother and Father shared custody of Grayson on nearly a fifty-fifty basis. Initially, Mother had physical custody of Grayson one week and Father had physical custody the next week. At some point in 1998, Mother proposed a modified visitation schedule, and the parties agreed to Grayson alternating three days with Mother and two days with Father.

According to Father, Mother attempted to change the visitation schedule every three months or so. Father testified that in order to ensure he had time with Grayson, he would pay more money for daycare or dance class, in addition to his child support obligation. In September 1999, Mother sent Father a letter in which she attempted to change Father's visitation to every other Friday through Monday. Mother also set forth Father's different

payment obligations and informed Father she would be performing all "mothering" duties, such as taking Grayson for doctor visits, buying clothes, and making decisions regarding Grayson's extracurricular activities. Following this letter, the parties ultimately compromised on an alternative visitation schedule giving Father three weekends plus one week with Grayson every month. However, in August of 2000, Mother phoned Father and notified him that because Grayson was beginning elementary school his visitation would be limited to every other weekend. Father tape recorded this telephone conversation.

On August 21, 2000, Father filed this action alleging a substantial change in circumstances supporting a change in custody and seeking an emergency ex parte order of custody. Father pled, in the alternative, for joint custody of Grayson, with the non-custodial parent to have liberal rights of visitation which he defined as "a minimum of fifty percent (50%) of the time, temporarily and permanently." Mother counterclaimed for sole custody. An ex parte order granted custody to Father on August 21, 2000, and a hearing was set for August 23, 2000. At the hearing, Father was granted temporary custody. Mother's motion for a stay of the temporary order and petition for supersedeas were denied.

At the final merits hearing in June 2001, Mother objected on several occasions to Father's attorney's line of questioning, arguing that because this was an action for a change of custody rather than a de novo proceeding, Father should not be permitted to introduce any evidence other than that relating to the alleged changes in circumstances. The family court judge admitted the testimony, finding it relevant. In addition, a transcript of the August 2000 telephone conversation was admitted at the hearing over Mother's objection. The family court issued a final order on September 28, 2001, granting sole custody to Father, with visitation for Mother to include alternating weekends, alternating holidays, and one month in the summer. Mother appeals.

STANDARD OF REVIEW

Decisions affecting the custody of a child are matters left principally to the discretion of the family court. Shirley v. Shirley, 342 S.C. 324, 330, 536 S.E.2d 427, 430 (Ct. App. 2000). However, in appeals from the family court, this court has the authority to find facts in accordance with our view of the preponderance of the evidence. Greene v. Greene, 351 S.C. 329, 335, 569 S.E.2d 393, 397 (Ct. App. 2002). This broad scope of review does not require us to disregard the findings of the family court. Id. Nor does it require us to ignore the fact that the family court judge, "who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Id. (citation omitted). An appellate court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the family court. Shirley, 342 S.C. at 331, 536 S.E.2d at 430.

LAW/ANALYSIS

I. Custody

In arguing the family court erred in awarding custody to the Father, Mother asserts that the court incorrectly treated this case as a de novo custody dispute instead of a change of custody dispute. See Allison v. Eudy, 330 S.C. 427, 429, 499 S.E.2d 227, 228 (Ct. App. 1998) (stating that a finding in the family court's order denying a motion for reconsideration that "'the scales tip in [the non-movant's favor],'" indicated the family court incorrectly treated the change in custody action as a de novo custody dispute). We disagree.

In all child custody cases, the paramount considerations are the child's welfare and best interests. Hollar v. Hollar, 342 S.C. 463, 472, 536 S.E.2d 883, 888 (Ct. App. 2000). The party seeking a change in custody assumes the burden of proof and must show changed circumstances occurring subsequent to the entry of the original custody order that substantially affect the interest and welfare of the child. See id. at 473, 536 S.E.2d at 888. In determining a change in custody, the family court should consider how the custody decision will impact all areas of the child's life and must assess each party's character, fitness and attitude as they impact the child. Shirley, 342

S.C. at 330, 536 S.E.2d at 430. "'There are no hard and fast rules for determining when to change custody and the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed.'" Id. (quoting Davenport v. Davenport, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975)). In order to determine whether a change in circumstances has been shown, the court must consider the facts leading up to and surrounding the present controversy. Stutz v. Funderburk, 272 S.C. 273, 277, 252 S.E.2d 32, 34 (1979). The usual factors family courts consider in determining the best interests of children are appropriate considerations. Glanton v. Glanton, 314 S.C. 58, 60 n. 3, 443 S.E.2d 810, 811 n.3 (Ct. App. 1994).

In support of Mother's argument that the family court incorrectly treated this change of custody case as a de novo custody dispute, Mother asks this court to consider, (1) Father's testimony, over Mother's objection, about Mother's family background and home life, (2) comments made by the family court judge in a telephone conference, and (3) that the final order mentioned the standard used for a de novo custody case, in addition to the standard for a change in custody case. We do not believe Mother's assertions are sufficient to find the family court incorrectly treated this case as a de novo custody dispute.

First, the testimony concerning Mother's family background and home life, which was admitted over Mother's objections, does not demonstrate that the judge improperly treated the case as a de novo dispute. Rather, the testimony demonstrates that the judge properly admitted evidence related to the child's best interest and the totality of the circumstances. See Hollar, 342 S.C. at 472-73, 536 S.E.2d at 888; Shirley, 342 S.C. at 330, 536 S.E.2d at 430.

We likewise reject Mother's second argument that the family court judge's remarks made during a telephone conference that Father presented a better situation do not demonstrate that the case was treated de novo. Initially we note that no transcript of the telephone conference appears in the record. See Bonaparte v. Floyd, 291 S.C. 427, 444, 354 S.E.2d 40, 50 (Ct. App. 1987) (stating that the appellant has the burden of furnishing a

sufficient record for this court's review). Mother asks this court to consider her attorney's restatement of these remarks during a Rule 59(e), SCRCP, hearing as evidence that the family court judge not only made the remarks but that the judge improperly treated the case as a de novo custody dispute. However, it is well settled law that arguments of counsel do not constitute evidence. See e.g. Sosebee v. Leeke, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987). Further, these remarks are not reflected in the final change of custody order except in the order's consideration of the best interests of the child and the totality of the circumstances. To the extent that the final order and the judge's remarks at the Rule 59(e) hearing are in conflict, the written order controls. See Corbin v. Kohler Co., 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002). The final order does not improperly use the de novo custody standard in changing custody as Mother argues. Mother is correct in that the order concludes, based on the totality of the circumstances and the best interests of the child, that Father should have the primary, sole custody of Grayson. However, Mother overlooks the court's initial determination that "Father has shown a substantial change in circumstance since the time of the parties' agreement and original custody order which impacts and affects the best interest of the child." The order also sets forth several changes in circumstance to support this finding. It was only after making this determination that the order addressed the child's best interests based on the totality of the circumstances. See Hollar, 342 S.C. at 472-73, 536 S.E.2d at 888; Shirley, 342 S.C. at 330, 536 S.E.2d at 430.

Mother also argues that the family court erred in awarding custody to Father because Father failed to show a substantial change in circumstances materially affecting the best interests of the child. Father alleged three changes in circumstance warranting a change in custody, including: (1) Mother's unilateral decision to change Father's visitation, (2) Father's remarriage and Grayson's close relationship with his new wife, and (3) Mother's cohabitation with her boyfriend in violation of the prior court order. The family court judge changed custody to Father based on the totality of the circumstances, including all three of the changed circumstances asserted by Father. We affirm the family court order changing custody to the Father based on Mother's decision to significantly reduce Father's visitation with Grayson.

In order to grant a change of custody, the party seeking the change bears the burden of showing changed circumstances occurring subsequent to the entry of the original custody decree. Kisling v. Allison, 343 S.C. 674, 679, 541 S.E.2d 273, 275 (Ct. App. 2001) (quoting Shirley, 342 S.C. at 330, 536 S.E.2d at 430). The change in circumstance relied on must be one that would substantially affect the interest and welfare of the child, not merely the wishes or convenience of the parties. Id. at 679, 541 S.E.2d at 275-76.

It was error for the family court judge to consider Mother's live-in relationship to be a change of circumstances. "A parent's morality, while a proper factor for consideration, 'is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child.'" Stroman v. Williams, 291 S.C. 376, 378, 353 S.E.2d 704, 705 (Ct. App. 1987) (citation omitted) (finding no material change in circumstances occurred from mother's live-in relationship with lesbian partner where child's welfare was not adversely affected). In the present case, there is no evidence showing Grayson was adversely affected by Mother and Stepfather living together prior to marriage. In fact, Father agreed that both Mother and Stepfather are positive influences in Grayson's life, and the Stepfather has "assisted as [a stepparent] in raising her, nurturing her, and attending to her needs." In addition, Father has had knowledge of Mother's cohabitation since 1997, and Father himself cohabitated with his present wife prior to their marriage in 1999.

Further, any adverse affect Mother's cohabitation may have had on her moral fitness was remedied by Mother's subsequent marriage to her boyfriend. See Sealy v. Sealy, 295 S.C. 281, 284, 368 S.E.2d 85, 87 (Ct. App. 1988) ("[R]emarriage which restores 'moral fitness' has been recognized as a factor to be considered in awarding change of custody."); Baer v. Baer, 282 S.C. 362, 365, 318 S.E.2d 582, 583 (Ct. App. 1984) (finding mother's marriage to her paramour reinstated her moral fitness). Finally, we do not see any merit to Father's argument that Mother's remarriage demonstrated her lack of judgment because it occurred two days before the emergency hearing. Mother obviously intended to marry her

boyfriend prior to Father filing the present action, as evidenced by the fact that a marriage license was acquired ten days prior to the filing. There is no evidence to suggest that the timing of Mother's remarriage materially affected the best interest and welfare of Grayson. See Baer, 282 S.C. at 365, 318 S.E.2d at 584 (finding no evidence to show that mother's sudden marriage substantially affected the welfare of the children).

Moreover, although the consent order prohibited Mother or Father from cohabiting with a member of the opposite sex while Grayson was present, "[t]he court may not award or change custody to punish a parent for acting in violation of the orders of the court." Smith v. Smith, 261 S.C. 81, 85, 198 S.E.2d 271, 273 (1973). See also Stroman, 291 S.C. at 378, 353 S.E.2d at 705 ("Custody is not to be used to penalize or reward a parent for his or her conduct."). In this case, it appears the family court judge placed an unnecessary emphasis on Mother's cohabitation. After Stepfather's redirect examination at the merits hearing, the family court judge questioned Stepfather regarding the relationship he and Mother had with their next-door neighbors, Charlie and Margie Creech, parents of the Honorable Wayne M. Creech. The judge asked, "Do you have anything to do with Judge Creech's parents?" In response to Stepfather's answer that the Creeches visited quite often, the judge replied, "I'm surprised to hear that. Because I wouldn't think he would have anything to do with anybody that's living together without benefit of marriage as straight-laced as he is and she is and Judge Creech is. I'm surprised they would have anything to do without [sic] anybody that's living together without the benefit of marriage." The judge's focus on this issue continued when he questioned Margie Creech:

> THE COURT: You gave an affidavit here and [it is] dated August the 22nd in the year 2000. If you would have known that [Mother and Stepfather] were not married, would you have given that affidavit? Would you have given them an affidavit that said: How much you enjoyed them as neighbors . . . .
>
> MARGIE CREECH: Yes, sir, I would have.

THE COURT: Even though they were not married. They were living together without the benefit of marriage and they were bringing their daughter in there, a young child in there?

MARGIE CREECH: Well, I don't guess that – I'm not down on anybody because of what they do because, you know, that I don't agree with it. Actually, I pray for them. So, therefore, they were good parents, so that's all I could see is say what I see.

We disagree with the emphasis placed on the Mother's cohabitation prior to her present marriage by the family court judge and with his finding that her cohabitation was a change in circumstances sufficient to warrant a change in custody.

Further, Father's current living situation alone, including his remarriage and Grayson's relationship with Stepmother, is not sufficient to support a change in custody. See Fisher v. Miller, 288 S.C. 576, 578, 344 S.E.2d 149, 150 (1986) (stating remarriage alone is not a substantial change of circumstances). In this particular case, Grayson has known both Stepmother and Stepfather since 1997, when both couples began dating. Grayson's relationship with her Stepmother in itself does not substantially affect her welfare and thus does not qualify as a change in circumstances because the evidence establishes that both Stepparents had been a positive influence on her life for over three years prior to the time Father commenced this litigation.

However, we agree with the family court judge's determination that Mother's unilateral decision to significantly reduce Father's visitation was a substantial change in circumstance materially affecting the best interests and welfare of Grayson. The original divorce decree granted the parties joint custody of Grayson and gave Mother primary physical custody and Father liberal rights of visitation. The decree did not set forth any guidelines as to how the parties should determine visitation nor did it specifically define what liberal visitation would be. Father exercised liberal visitation from 1997 to August 2000. During this time, Mother and Father

shared physical custody of Grayson. Mother frequently attempted to change Father's visitation schedule by reducing Father's visitation. On each occasion, the parties successfully negotiated an alternate visitation schedule, which gave Father more time with his daughter. Father testified that he would have to agree to give Mother more money or take on additional expenses in order to have more time with Grayson. However, in August of 2000, Mother phoned Father and notified him that because Grayson had started elementary school his visitation would be limited to every other weekend. Based on the transcript of this conversation, Mother was unwilling to negotiate with Father regarding this new schedule and even further reduced Father's access to Grayson's extracurricular activities when he attempted to negotiate additional time with Grayson.

Mother argues there is no evidence in the record to show that her proposed visitation change negatively impacted Grayson. However, contrary to Mother's assertion, the requirement that the party seeking to change custody must show a change of circumstances affecting the interests and welfare of the child does not require a finding of a present existing injury to the child. See Routh v. Routh, 328 S.C. 512, 520, 492 S.E.2d 415, 419 (Ct. App. 1997). Rather, "[a]n existing unhealthy environment that is likely to impact on the child in the future, affects the welfare of the child." Id. at 520, 492 S.E.2d at 420. In this case, Mother has made repeated attempts to diminish Father's time with Grayson despite the decree awarding the parties joint custody and the Father liberal visitation. Mother's final proposal of visitation every other weekend suggested a significant reduction in the time Grayson had been spending with Father. It is uncontroverted that Grayson was thriving under the previous visitation schedule, which allowed her to see Father nearly fifty percent of the time. The Mother's new proposed visitation schedule provided for visitation with Father only every other weekend and would significantly limit Father's ability to be an active and positive influence in Grayson's life. Further, the transcript of the tape recorded telephone conversation demonstrates that Mother was unwilling to compromise on the issue and even suggested that Mother retaliated against Father by further reducing his visitation. As such, we find Mother's decision to significantly reduce Father's visitation with Grayson substantially affected the welfare and best interest of the child and constituted a change in

circumstance warranting a change in custody to Father. See Watson v. Poole, 329 S.C. 232, 239, 495 S.E.2d 236, 240 (Ct. App. 1997) (changing custody to father based in part on mother's unwillingness to facilitate the child's visitation with father and arbitrarily canceling father's visitation); Morehouse v. Morehouse, 317 S.C. 222, 226-27, 452 S.E.2d 632, 634-35 (Ct. App. 1994) (upholding an award of custody to father where mother was unwilling to encourage a relationship between the child and father).

II. Mother's Visitation

Mother argues the family court erred in restricting her visitation to every other weekend, alternating holidays, and one month in the summer. We agree.

Although we affirm the change in custody to Father due to Mother's unilateral decision to alter his visitation, we do not believe the evidence supports an award of standard visitation to Mother. The welfare and best interests of the child are the primary considerations in determining visitation. Paparella v. Paparella, 340 S.C. 186, 191, 531 S.E.2d 297, 300 (Ct. App. 2000). The family court has broad discretion to decide visitation issues and its decision will not be disturbed on appeal absent an abuse of discretion. Id.

The type of visitation the judge granted Mother in this case is considered "standard" visitation. See Woodall v. Woodall, 322 S.C. 7, 12, 471 S.E.2d 154, 158 (1996). Although visitation tantamount to divided custody is disfavored, in certain circumstances courts will expand visitation beyond standard. See id. (stating that visitation tantamount to divided custody is avoided). But see S.C. Code Ann. § 20-7-420(42) (Supp. 2003) ("The family court shall have exclusive jurisdiction . . . [t]o order joint or divided custody where the court finds it is in the best interest of the child."); Paparella, 340 S.C. at 191, 531 S.E.2d at 300 (finding the evidence did not support an award of standard visitation to the father and expanding his visitation). In Paparella, this court granted additional visitation to the father because he was very involved in raising his children and the mother testified she thought father should receive more than just standard visitation. 340 S.C.

at 191, 531 S.E.2d at 300. Similarly, there is overwhelming evidence in this case, including testimony from all four parents, teachers, family members, and neighbors showing Grayson was thriving on the previous visitation schedule, which allowed her to see both parents virtually equally. Father testified both parents had been very active in Grayson's life. Father also agreed it was healthy for Grayson to see both of her parents at her ballgames and dance recitals. Just as in Paparella, Father stated he thought Mother should receive more than standard visitation. He believed both parents should have "liberal access" to Grayson. He agreed if he were in Mother's position, alternating weekends would not be fair. Father even agreed that the standard visitation would be detrimental to Grayson's well-being and that all four parents should have equal access to her. In fact, Father pled, in the alternative, for a continuation of the joint custody arrangement the parties had previously enjoyed.

Mother testified she wanted the visitation arrangement to go back to the way it was before she changed it, where both Mother and Father spent equal amounts of time with Grayson. Mother admitted it was a mistake for her to change the schedule. Referring to the every other weekend visitation schedule, she stated, "I don't believe it's healthy for anyone to be away from their child for that long," and that standard visitation is not in Grayson's best interests.

In addition to the testimony of family and friends, the guardian ad litem testified that it would be in Grayson's best interests for her to spend time equally at each of her parent's homes.

Based on the above, we reverse the family court's order granting standard visitation to Mother. While Father remains the primary, sole custodian, we find Mother should receive expanded visitation and remand this issue to the family court to establish a schedule consistent with this opinion.

III. Guardian Ad Litem's Recommendation

Mother argues the family court erred in failing to give proper weight to the recommendation of the guardian ad litem and in failing to consider joint custody as recommended by the guardian ad litem.[1] In light of our determination that the family court did not err in changing custody to Father and our remand of the visitation issue, we need not reach this argument on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding it unnecessary to review remaining issues when disposition of prior issues are dispositive).

IV. Attorney's Fees

Mother contends the family court erred in awarding Father $23,469.79 in attorney's fees. We agree that this issue should be remanded for reconsideration by the family court judge in light of our decision to remand the issue of visitation.

The award of attorney's fees is left to the discretion of the family court and will not be disturbed absent an abuse of discretion. Smith v. Smith, 308 S.C. 492, 496, 419 S.E.2d 232, 234-35 (Ct. App. 1992). The court considers the following factors in awarding attorney's fees: (1) the beneficial results obtained; (2) the abilities of the parties to pay; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fees on

---

[1] We note that subsequent to the merits hearing in this case, the South Carolina General Assembly specifically addressed the role of private guardians ad litem in family court actions in which custody or visitation of a minor child is at issue. See S.C. Code Ann. § 20-7-1545 to – 1557 (Supp. 2003). In particular, the General Assembly made clear that a guardian may only be appointed when "the court will likely not be fully informed about the facts of the case and there is a substantial dispute which necessitates a guardian ad litem," and with both of the parties' consent. S.C. Code Ann. § 20-7-1545 (Supp. 2003). Additionally, the code provides that a guardian must not include a recommendation concerning custody in the written report, nor may the guardian include a recommendation at the merits hearing unless specifically requested by the court for reasons specifically set forth in the record. S.C. Code Ann. § 20-7-1549(A)(6) (Supp. 2003).

each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992) (citing Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991)).

Because we remand the issue of visitation in order to give Mother expanded visitation, Father's beneficial results have been altered. Therefore, we remand this issue for a de novo review by the family court.

As to Mother's arguments regarding the specific hourly rate charged, the hours incurred, or the expert witness fees, these issues are not preserved. Mother did not raise any objection to these issues at trial. An issue not raised at trial is not properly before an appellate court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). However, because we are remanding the issue of attorney's fees de novo, Mother may raise these issues on remand.

CONCLUSION

We find the family court did not err in finding a substantial change in circumstances based on Mother's unilateral decision to alter Father's visitation. However, we find it is in Grayson's best interests to spend considerable time with both of her parents. Therefore, we reverse the family court's award of standard visitation to Mother, and remand this issue for an increase in Mother's visitation consistent with this opinion. We also remand the issue of attorney's fees. For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., ANDERSON and BEATTY, J.J., concur.