

THE ARKANSAS SUPREME COURT HOLDS THAT THE CIRCUIT COURT DID NOT CLEARLY ERR IN FINDING THAT A MOTHER'S DESIRE TO CONTINUE NURSING HER MINOR CHILD DOES NOT CONSTITUTE A MATERIAL CHANGE OF CIRCUMSTANCES SO AS TO WARRANT A CHANGE OF VISITATION.

In *Brown v. Brown*,¹ the Arkansas Supreme Court affirmed the circuit court's finding that a mother's desire to continue nursing her infant child does not constitute a material change of circumstances so as to warrant the court's consideration of a change of visitation.²

On August 10, 2010, appellee Vernon Brown filed a first amended complaint for absolute divorce from appellee Michelle Brown in circuit court.³ At a hearing October 21, 2010, the parties stated to the court that they had come to an agreement on visitation and custody which provided that Michelle would be granted custody of the parties' infant daughter.⁴ For the first eighteen months of their child's life, Vernon would have a relatively limited visitation schedule to accommodate Michelle's breast-feeding of the child.⁵ After the first eighteen months, the parties agreed to adopt the standard visitation schedule.⁶ The circuit court accepted the agreement and incorporated its terms in the divorce decree filed November 8, 2010.⁷

Notwithstanding Michelle's modest efforts to wean the child, at the time their daughter reached eighteen months of age on June 26, 2011, "she was still nursing aggressively six times a day."⁸ By mid-July, well into Vernon's scheduled summer visitation, the parties implemented a weaning schedule.⁹ Several weeks into the weaning process, however, Michelle met with Pamela McArthur Elliot, a lactation consultant with whom she had met previously once before, who advised her to continue to nurse the child daily for up to two years of age and beyond.¹⁰ Following Elliot's recommendation, Michelle informed Vernon that they must stop the weaning process and return to a daily nursing schedule.¹¹

After failing to agree on a visitation schedule with Vernon, on July 28, 2011, Michelle filed a motion requesting the circuit court modify the visita-

1. 2012 Ark. 89, 387 S.W.3d 159 (2012).
2. *Id.* at 9–10, 387 S.W.3d 165 .
3. *Id.* at 1, 387 S.W.3d 160.
4. *Id.* at 2, 387 S.W.3d 160.
5. *Id.*
6. *Id.*
7. *Brown*, 2012 Ark. 89, at 2, 387 S.W.3d 161.
8. *Id.*
9. *Id.* at 2–3, 387 S.W.3d 161.
10. *Id.* at 3, 387 S.W.3d 161.
11. *Id.*

tion schedule set out in the decree.¹² As the basis for her motion, Michelle stated that she was still breast-feeding the child, and that she should continue to do so until the child reaches at least two years of age as recommended by Elliot, the World Health Organization, and the American Academy of Pediatricians.¹³ After a formal hearing on the matter, the circuit court dismissed Michelle's motion for change in visitation, finding that she had failed to prove a material change in circumstances.¹⁴ The Arkansas Supreme Court granted Michelle's appeal of her motion's dismissal.¹⁵

On appeal, Michelle claimed that the circuit court erred in finding that she had failed to prove a material change in circumstances.¹⁶ As the basis for her contention, she argued that at the time she and Vernon agreed upon the visitation schedule incorporated within the decree, neither party had anticipated that their child would still be nursing so aggressively after eighteen months of age.¹⁷

Vernon's primary counterargument on appeal was that the circuit court was correct in finding that no material change in circumstances had occurred because both parties were aware at the time of the agreement that the child may wish to continue nursing past eighteen months of age.¹⁸ Thus, no circumstance had changed since the time of the entry of the decree, only the attitude of Michelle toward Vernon's visitation.¹⁹

Before addressing the merits of Vernon's claim, the Arkansas Supreme Court articulated the standard of review, holding that in "domestic-relations cases, [courts of appeal] consider the evidence de novo, [but] will not reverse the circuit court's findings unless they are clearly erroneous."²⁰

Having established the standard of review, the court proceeded to discuss the initial burden a moving party must meet in a domestic relations case to warrant consideration of the merits of modification.²¹ Emphasizing the judicial system's interest in discouraging repeated litigation over the same issues, the court applied the common law rule that a party seeking modification of an order must first demonstrate a material change in circumstances before the circuit court may consider the merits of the movant's claim.²²

12. *Id.* at 9–10, 387 S.W.3d 161.

13. *Brown*, 2012 Ark. 89, at 3, 387 S.W.3d 161.

14. *Id.* at 3–4, 387 S.W.3d 161.

15. *Id.* at 4, 387 S.W.3d 161.

16. *Id.* at 6, 387 S.W.3d 161–62.

17. *Id.*, 387 S.W.3d 162.

18. *Id.*, 387 S.W.3d 163.

19. *Brown*, 2012 Ark. 89, at 6, 387 S.W.3d 163.

20. *Id.* at 6–7, 387 S.W.3d 163 (quoting *Hass v. Hass*, 80 Ark.App. 408, 97 S.W.3d 424 (2003)).

21. *Id.* at 7, 387 S.W.3d 163 (quoting *Hass*, 80 Ark.App. 408, 97 S.W.3d 424).

22. *Id.*

The movant, however, may not claim a material change in circumstances that she herself created.²³ To support this proposition, the court examined previous case law.²⁴ In *Jones v. Jones*,²⁵ the circuit court ordered a change in custody, basing its finding of a material change in circumstances at least in part on the Dr. Jones's remarriage following the circuit court's initial award of custody to the mother in the divorce decree.²⁶ On appeal, the Arkansas Supreme Court observed from the record that the Dr. Jones had already entered into relations with his present wife at the time the divorce decree awarding custody to his former wife was entered.²⁷ It further noted that Dr. Jones had admitted that the possibility of remarriage was reasonably within his contemplation at the time of the initial award of custody.²⁸ Based on these facts, the court reversed the circuit court's finding, holding that "[g]iven [Dr. Jones's] awareness of the circumstances at the time he voluntarily entered into the agreement to award custody . . . to Ms. Jones, we cannot agree that his remarriage constituted a material change in circumstances."²⁹

The court further considered the opinion issued by the Arkansas Court of Appeals in *Stellpflug v. Stellpflug*.³⁰ In *Stellpflug*, a mother sought a modification in visitation primarily due to her children's desire to see her over the summer and her financial difficulty in performing the current visitation schedule.³¹ Although not unsympathetic with the mother's plight, "the court of appeals held that the circuit court erred in [awarding a modification of] visitation because 'the only change that occurred in this case was [the mother's] attitude regarding summer visitation.'"³²

With this case precedent in mind, the Arkansas Supreme Court concluded that the circuit court did not err in finding that Michelle Brown failed to prove a material change in circumstances.³³ In its analysis, the court focused on the fact that the possibility the child would continue to desire breast-feeding past eighteen months was well within the reasonable contemplation of the parties.³⁴ Reviewing the record de novo, the court found that during Michelle's initial visit with Elliot immediately following the birth of

23. *Id.*, 387 S.W.3d 163–64 (citing *Jones v. Jones*, 326 Ark. 481, 491, 931 S.W.2d 767, 772 (1996)).

24. *Id.*

25. 326 Ark. 481, 931 S.W.2d 767 (1996).

26. *Brown*, 2012 Ark. 89, at 7, 387 S.W.3d 163–64.

27. *Id.* at 8, 387 S.W.3d 163.

28. *Id.*, 387 S.W.3d 163–64.

29. *Id.*, 387 S.W.3d 164 (quoting *Jones*, 326 Ark. at 490, 931 S.W.2d at 772).

30. 70 Ark. App. 88, 14 S.W.3d 536 (2000).

31. *Brown*, 2012 Ark. 89, at 8–9, 387 S.W.3d 164.

32. *Id.*, 387 S.W.3d 164 (quoting *Stellpflug*, 70 Ark. App. at 93, 14 S.W.3d at 539).

33. *Id.* at 9–10, 387 S.W.3d 164.

34. *Id.*, 387 S.W.3d 165.

her child, Elliot had provided her with materials recommending nursing for two years and beyond.³⁵ Additionally, Michelle had previous experience with the weaning process with her two other children, who were both breast-fed as infants.³⁶ The court also emphasized that child's continued aggressive nursing was at least in part the fault of Michelle, who had had ample opportunity to contact Elliot before the eighteen-month deadline regarding any questions she had related to weaning but had failed to do so.³⁷

The court concluded that since Michelle was familiar with the weaning process and aware of the possibility that the child would continue to want to nurse past eighteen months at the time she agreed to the eighteen-month time frame, she may not claim a material change in circumstances that she herself had created.³⁸

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35. *Id.* at 10, 387 S.W.3d 164–65.

36. *Id.*, 387 S.W.3d 165.

37. *Brown*, 2012 Ark. 89, at 10, 387 S.W.3d 165.

38. *Id.* at 10, 387 S.W.3d 165.