Circuit Court for Montgomery County
Case No. 122924FL

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 139

September Term, 2023

EMMANUEL DE JESUS GARCIA ESTEVES

v.

WALDY KATHERINE COMPRES

Wells, C.J.
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: August 14, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This is an unreported opinion and may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation confirms to Rule 1-104(a)(2)(B).

This case involves a custody dispute between Emmanuel De Jesus Garcia Esteves ("Father") and Waldy Katherine Compres ("Mother") regarding the parties' minor child ("E."). In 2015, the Circuit Court for Montgomery County entered a custody order granting Mother primary custody of E., with Father being granted access via an access schedule.

In 2022, Mother filed a motion to modify custody. Following a hearing, the court granted Mother's motion and entered an order restricting Father's access to "such times and locations as determined by [Mother]." Father appealed.

In this appeal, Father has filed an informal brief, in which he raises a multitude of issues. For clarity, we have consolidated those issues into a single question:

Did the trial court err in modifying custody?

For reasons discussed, we hold that the court did not err. Accordingly, we affirm the court's judgment.

BACKGROUND

Mother and Father were married in 2009. In 2013, E. was born. One year later, Mother filed for divorce. During the course of those proceedings, the parties entered into a Consent Order, whereby Mother was granted primary physical custody of E., and Father was granted access every other weekend and once per week for a dinner visit. The issue of legal custody was deferred to a later hearing, which was held in June 2015. Following that hearing, at which Father did not appear, Mother was granted sole legal custody of E.

In November 2015, the court granted the parties an absolute divorce. The court's prior custody orders were incorporated into the divorce judgment.

Petition to Modify Custody

In February 2022, Mother filed a motion to modify custody. In her motion, Mother claimed that E. had been "traumatized from the last time he had an overnight with his father." Mother asked that Father not be allowed to have overnight visits with E.

Shortly thereafter, Father filed his own motion to modify custody. Father asked that he be given additional access to E. Father also filed a petition for contempt against Mother, claiming that Mother had denied him access to E.

On April 20, 2022, the parties appeared in court remotely for a scheduling conference. The court ordered the parties to appear in court on June 2, 2022, for a post-judgment settlement conference. It does not appear from the record that Father attended that post-judgment settlement conference.

On November 9, 2022, the parties appeared in court for a hearing on the merits. For reasons not entirely clear from the record, the matter was postponed. A new hearing date was set for March 1, 2023.

Hearing

On March 1, 2023, Mother returned to court with counsel for the merits hearing. Father did not appear. After remarking on Father's absence, the court ordered a recess to give Father "a little more time to get here." The court then asked if Mother's counsel would contact Father to "see what his status is."

Sometime later, the proceedings resumed. The court noted that Father was still not in the courtroom and that counsel's efforts at contacting Father were unsuccessful. The court then proceeded with the hearing in Father's absence.

Mother's counsel began with opening remarks. Following those remarks, counsel stated that he wanted to amend his request for relief. Counsel alleged that Father had posted on social media a picture of E. and a message that could have been construed as a comment on the pending custody matter. Counsel asked that Father be prohibited from making similar posts in the future.

Mother thereafter testified that, per the court's previous custody order, which was entered in December 2015, Father had access to E. every other weekend and once per week for dinner visits. The court took judicial notice of the prior orders. Mother testified that, in the nine years since that order was entered, Father had exercised his right to dinner visits only "two or three times." Mother also claimed that Father would frequently miss his weekend visits. Mother testified that, in 2019, Father moved to New Mexico, where he stayed for two years. Mother testified that, during those two years, Father saw E. only twice. Mother testified that Father moved back to Maryland in 2021, at which point she made efforts to facilitate visits between him and E. Mother stated that she never tried to block Father's access to E.

Mother testified that, following an incident that occurred in October 2021, she became concerned about the access E. was having with Father. Mother explained that E., who was approximately eight years old at the time, had gone to Father's for an overnight

visit. The following morning, Mother received a video call from E. Upon answering the call, Mother noticed that E.'s face was swollen and that he was terrified. E. stated that he was hungry, and he begged Mother to come get him. When Mother asked where Father was, E. said that he was sleeping. Eventually, Father came to the phone, and Mother could hear Father yelling at E. and E. crying. Mother then went to Father's house and retrieved E.

Mother testified that, following that incident, Father did not speak to E. for several months. Mother stated that E. was reluctant to speak with Father because of the incident. In or around April 2022, E. agreed to participate in a video call with Father in Mother's presence. Mother testified that E. appeared afraid during the call. Mother stated that she nevertheless proposed that E. resume his visits with Father in a limited capacity. According to Mother, Father balked at that suggestion and insisted that they follow the schedule that was in place. Mother testified that she encouraged Father to contact "Safe Passages" to arrange supervised visitations with E., but Father had refused. Mother testified that Father did not exercise his right to access at any point thereafter.

Mother testified that, in May 2022, E. was enrolled in therapy, which was ongoing. Mother testified that she had reached out to Father on multiple occasions to facilitate communications between Father and E.'s therapist. Mother stated that she was eager for E. to have a relationship with Father and that she would continue to try to foster that relationship.

Mother testified that, at the time, she did not believe it was in E.'s best interest for Father to have access. Mother testified that Father was too inconsistent in his efforts at forming a relationship. Mother also testified that she had recently become aware of a report that E. had made to his daycare provider. According to Mother, E. had informed the provider that Father "used to hit him." Mother testified that she later asked E. about the report. Mother stated that E. told her that he never reported the abuse to her because he was afraid that Father was going to hurt her.

Court's Ruling

At the conclusion of the hearing, the trial court issued an oral ruling granting Mother's motion to modify and denying Father's motion to modify and his petition for contempt. In so doing, the court made the following findings:

> In the consent custody order [Mother] was awarded sole legal and primary physical custody of the minor child. In the consent order [Father] was awarded access with the child occurring on alternative weekends from Saturday at 9:00 a.m. until Sunday at 3:00 p.m. and then also mid-week dinner visits and also other access during the child's birthday and other holidays. I will find that [Father] has not exercised all of the access that was awarded to him. He moved out of the area on two occasions and for long stretches of time did not have any access with the child and even when he was still living in Montgomery County or the Washington metropolitan area, he still did not exercise all the visitation that was afforded him through the consent order.
>
> I will also find that the child did express behavior, which is concerning, with regard to [Father's] access. The child at times appeared reluctant to exercise that access. I will find that [Mother] attempted to address those issues with [Father.] I will find that she spoke with him about having secure access with the child at Safe Passages, which would have continued [Father's] access with the child in a safe environment, and I will also find that the child has entered therapy and [Mother], who has the legal custody of the child, believed that that was necessary and it was her right to

make that decision with regard to the child and did so after the child expressed problems with regard to having access with [Father].

So based upon those findings, I will conclude that there's been a significant change in circumstances. ... I think it is significant when a parent, who has access with the child, does not exercise all of that access.

I also think it's significant that when the child begins to demonstrate behavior that is concerning after having access or is going to be scheduled to have access with the child, that it's appropriate to be in therapy at that time in hopes that the therapist can help the child and oftentimes will help the parents as well with regards to addressing what is the problem and how it needs to be addressed. I will find as a finding of fact that [Father] would make requests to immediately reinstate the access that was awarded by the Court after months of not seeing the child at all, and that in my opinion is not appropriate. The child, sadly to say it like this, needs to become reacquainted with his parent, but that's what was offered by [Mother] in this case. I think it was a demonstration of good judgment to try to do it that way and [Father] refused to do that, instead [he] continued to demand that he have the child during those time periods from the 2015 court order, and that was unreasonable on his part and I believe was inappropriate on his part and not in the child's best interest.

* * *

Now getting over that hurdle, I have to address all the factors that would basically be in the child's best interest as to what would be the appropriate access schedule for [Father] going forward. I will say that to be a part of your child's life, to be involved with your child is a fundamental right, and to completely cut off access at this time that's a drastic thing to do and to suspend it as [Mother] is requesting.

I believe that [Mother] has as I said demonstrated excellent judgment by trying to balance the child's need to see and be a part of his father's life against making sure that the child is safe, and [Father] has just not responded to that. He doesn't understand how harmful it is to a child to go months without seeing the child so I'm going to try to find that balance as well and the balance that I'm going to do is to say that the child's access with the father will be as follows:

[Father's] access shall be at such times and locations as determined by [Mother]. She's demonstrated the good judgment to know when it would

> be appropriate and rather than to just say it's suspended, I think the better approach is to put it into her hands by getting the therapy, suggesting Safe Passages. I think she's demonstrated the good judgment where she will know what's appropriate with regard to the access that would be in the child's best interest in making sure that he is safe.[1]
>
> * * *
>
> Given that [Father] has not had the access that he was awarded, I'm concerned what the effect would be on the child if the child saw pictures of him on social media. That's not the access that I want [Father] to have with his son. I want him to have a good healthy relationship with him, so I will grant [Mother's] request that no photographs be placed on social media account by [Father], photographs I mean of the minor child.
>
> I've gone over financial statements. It appears I'm going to find that [Father's] petition for contempt was not necessary at all in this matter. I think it was filed in retaliation for [Mother] understandably wanting to restrict [Father's] access until he went through some reunification either informally or formally with the child, but I think he filed that in retaliation. I think he also filed the petition for modification of custody and visitation in retaliation. I noted that he failed to appear at the court-ordered post-judgment mediation, and that cause[d] unnecessary expenses for [Mother].

The trial court's oral findings were subsequently reduced to a written order. On March 7, 2023, Father filed a motion to vacate the court's custody order. In that motion, Father stated that he "missed the court hearing on March 1st" because he "mistakenly

[1] In this appeal Father does not take issue with the fact that the court permitted Mother to determine where and when Father's visitation would take place. Had the issue been raised, we think this situation distinguishable from cases such as *Shapiro v. Shapiro*, 54 Md. App. 477 (1983). There, the court delegated decisions about visitation to the child's therapist. We held that decision-making authority was vested solely within the court. *Id*. at 484. Here, the court determined that because Father repeatedly exercised of poor judgment that was harmful to E., Mother was the better parent to have sole legal and physical custody. The court found that it was in E's best interests to allow Mother to assess how visitation would go forward, rather than deny Father any visitation, which *Shapiro* also cautioned against, absent extraordinary circumstances. *Id*. at 483-84.

believed that it was scheduled for March 2nd." Father also stated that the court had failed to notify him of the court date. Father asked that the custody order be vacated and a new hearing scheduled. Father filed this appeal shortly thereafter. On June 15, 2023, the court denied Father's motion to vacate.

DISCUSSION

Parties' contentions

In this appeal, Father alleges a multitude of "procedural and substantial errors" that he claims occurred during the proceedings. Father contends that those errors caused an unjust outcome and that, consequently, the court's modified custody order should be vacated.

Mother argues that Father's appeal should be dismissed because his informal brief did not conform to this Court's guidelines for the structure of informal briefs. On the merits, Mother contends that Father's claims of error are without merit and that the court's ruling was fair and consistent with all applicable legal principles.

Motion to Dismiss

We deny Mother's motion to dismiss. Although we agree that Father's informal brief did not strictly comply with this Court's Administrative Guidelines for the filing of informal briefs, we are not persuaded that dismissal is appropriate, as it does not appear that Father's actions were deliberate or that Mother was prejudiced. *Rollins v. Capital Plaza Associates, L.P.*, 181 Md. App. 188, 202-03 (2008) ("This Court will not ordinarily dismiss an appeal 'in the absence of prejudice to appellee or a deliberate violation of the

rule.'") (quoting *Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 348 (2007)). We now turn to the merits of Father's various contentions.

Standard of Review

Appellate review of a trial court's decision regarding child custody involves three interrelated standards.[2] *Arizona v. Suleymanov*, 243 Md. App. 340, 372 (2019). First, any factual findings are reviewed for clear error. *Id.* Second, any legal conclusions are reviewed without deference. *Id.* Finally, if the court's ultimate conclusion is "founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion." *Id.* (quoting *In re Yve S.,* 373 Md. 551, 586 (2003)).

Analysis

As noted, Father argues that, because of various "errors" prior to or during trial, the court's modified custody order should be vacated. As we will discuss in greater detail below, none of Father's arguments has merit. The record makes plain that the court's decision was based on sound legal principles and factual findings there were not clearly erroneous, and there is no evidence that the court abused its discretion. To the extent that the court did err, Father has failed to establish that he was prejudiced by those "errors." Accordingly, we shall affirm the court's judgment.

[2] Father insists that the standard of review is entirely non-deferential. Father is mistaken.

A.

Father first argues that the trial court violated his due process rights by failing to give him proper notice of the merits hearing held on March 1, 2023. Father claims he "was not served with a notice of the hearing" and "was not aware that the hearing was even scheduled."

Father's argument is not supported by the record. Father was present at the hearing on November 9, 2022, when the court scheduled the March 1 merits hearing. Moreover, Father all but admitted that he was aware of the merits hearing when he stated in his motion to vacate that he "missed the court hearing on March 1st" because he "mistakenly believed that it was scheduled for March 2nd." Father clearly had adequate notice of the merits hearing. The court was not required to serve him with any additional notice.

B.

Father next claims that the court erred in taking judicial notice of the parties' divorce judgment and original custody order. Father argues that, per Maryland Rule 5-201, which governs the court's ability to take judicial notice of adjudicated facts, the court was required to give him the opportunity to contest the documents' accuracy and relevance. Father also argues that the court erred because the documents were subject to dispute and the Rule only permits judicial notice of facts that are not subject to reasonable dispute.

None of Father's arguments has merit. Father was given the opportunity to contest the documents at the merits hearing. For whatever reason, he chose not to attend the hearing. Furthermore, Rule 5-201 does not require prior notice before a court can take

judicial notice of an adjudicated fact. The relevant portion of the Rule states: "Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." Md. Rule 5-201(e). There is no evidence that the court violated any portion of that Rule.

As to Father's claim that the documents were subject to dispute, we disagree. Rule 5-201 states, in pertinent part, that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is … capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Md. Rule 5-201(b). Clearly, the court's own order, which merely established the fact of the party's divorce and the circumstances of the party's current custody arrangement, was not subject to reasonable dispute and could not reasonably be questioned. *See Landover Associates Ltd. Partnership v. Fabricated Steel Products, Inc.*, 35 Md. App. 673, 681 (1977) (noting that a court "can obviously notice its own records").

Regardless, any error the court may have made in taking judicial notice of the documents was harmless. There is nothing in the record to indicate that the documents were used for any purpose other than to provide basic, background information. *See In re H.R.*, 238 Md. App. 374, 408 (2018) (holding that juvenile court's judicial notice of a father's criminal case file in termination of parental rights proceeding was harmless, where the court relied upon the file only to find that the father had been convicted of a crime).

C.

Father next claims that the trial court erred in determining that there had been a significant change in circumstances that justified a modification of the original custody order. Father asserts that Mother failed to prove that E. suffered a trauma at Father's house in October 2021.

"On a motion for modification of custody, a trial court employs a two-step process: (1) whether there has been a material change in circumstances, and (2) what custody arrangement is in the best interests of the children." *Santo v. Santo*, 448 Md. 620, 639 (2016). "A material change of circumstances is a change in circumstances that affects the welfare of the child." *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012). "Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child." *McCready v. McCready*, 323 Md. 476, 482 (1991). "The burden is then on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008).

We hold that the trial court did not err in finding a material change in circumstances. First, Father is incorrect in claiming that Mother did not produce evidence of a "trauma." Mother testified to an incident that occurred in October 2021 at Father's house that caused significant trauma to E. and affected E.'s willingness to spend time with Father. The court was within its right in crediting that testimony.

Even so, the trial court did not rely solely on that incident in finding a material change in circumstance. Rather, the court also cited Mother's testimony regarding Father's sporadic presence in E.'s life and his general disinclination for exercising the access he was awarded in 2015 as part of the original custody order. The court found that those changes affected E.'s well-being and that a modification of the custody order would be in E.'s best interest. The court's decision was not clearly erroneous nor an abuse of discretion.

D.

Father next claims that the court erred in modifying his access to E. Father contends that the court's decision was "not suitable" because it did not allow him "to have enough time with the child." Father also contends that the court did not satisfactorily consider all relevant factors.

In *Taylor v. Taylor*, 306 Md. 290 (1986) and *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406 (1977), our appellate courts set forth a non-exhaustive list of factors a court should consider in determining custody. *Accord Jose v. Jose*, 237 Md. App. 588, 599-600 (2018). "When considering the *Sanders-Taylor* factors, the trial court should examine 'the totality of the situation in the alternative environments and avoid focusing on or weighing any single factor to the exclusion of all others.'" *Id.* at 600 (quoting *Best v. Best*, 93 Md. App. 644, 656 (1992)).

That said, "[t]he primary goal of access determinations in Maryland is to serve the best interests of the child." *Conover v. Conover*, 450 Md. 51, 60 (2016). "The best interest of the child is therefore not considered as one of many factors, but as the objective to which

virtually all other factors speak." *Taylor*, 306 Md. at 303. Moreover, "trial courts are entrusted with 'great discretion in making decisions concerning the best interest of the child.'" *Gizzo v. Gerstman*, 245 Md. App. 168, 200 (2020) (quoting *Petrini v. Petrini*, 336 Md. 453, 469 (2020)). Thus, "the trial court's decision governs, unless the factual findings made by the trial court are clearly erroneous or there is a clear showing of an abuse of discretion." *Id.* (quoting *Gordon v. Gordon*, 174 Md. App. 583, 637-38 (2007)). "Indeed, custody decisions are 'unlikely to be overturned on appeal.'" *Id.* at 201 (quoting *Domingues v. Johnson*, 323 Md. 486, 492 (1991)).

We hold that the trial court did not abuse its discretion in setting the access schedule. The record makes plain that the court carefully considered the evidence and relevant circumstances and that the court made a reasonable decision based on E.'s best interest. Although the record does not reflect that the court made an express finding as to all possible factors, the record does show that the court at least considered and weighed all the relevant factors before making its decision. That was sufficient. *See J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 253 (2021). ("It is undisputed that there are numerous factors the court must *consider and weigh* in its custody determination.") (emphasis added).

E.

Father next claims that Mother's counsel made repeated assertions about Father's behavior and the circumstances of the case that were not supported by the evidence. Father insists that those assertions undermined the proceeding's fairness and legality.

Although we do not agree with Father's claim that counsel's behavior was inappropriate, we need not delve into the specifics of that claim because Father has failed to show that he was prejudiced. Generally, a reviewing court will not reverse a lower court judgment if the complaining party does not suffer prejudice. *Shealer v. Straka*, 459 Md. 68, 102 (2018). "[P]rejudice occurs when an error affects the outcome of a case." *Sumpter v. Sumpter*, 436 Md. 74, 87 (2013). "The party complaining that an error has occurred has the burden of showing prejudicial error." *Shealer*, 459 Md. at 102. "Prejudice will be found if a showing is made that the error was likely to have affected the verdict below." *Id.* at 102-03 (quoting *Crane v. Dunn*, 382 Md. 83, 91 (2004)). "[T]he complaining party must show that prejudice was probable, not just possible." *Sumpter*, 436 Md. at 87.

Here, Father has failed to present, and we could not find, any evidence in the record to indicate that counsel's actions affected the trial court's decision. To the contrary, our review of the record reveals that the court's decision was based on the evidence and not on the arguments or actions of counsel.

F.

Father next claims that the merits hearing was "marred by several procedural and evidentiary errors." Specifically, Father asserts that Mother "made a request for relief unrelated to the original complaint." Father also asserts that "the court reporter was unable to properly transcribe the hearing due to [Mother's] inaudibility, potentially compromising the accuracy of the record."

We find Father's claims to be without merit. First, it is not entirely clear what Father is referring to when he argues that Mother made a request for relief unrelated to the original complaint. If he is referring to Mother's request that Father be prohibited from posting images of E. on social media, we cannot say the trial court erred in granting that relief. A court has broad discretion in imposing conditions in a child custody order, even when such conditions have not been prayed for by either party, provided that the condition serves the child's best interest. *Cohen v. Cohen*, 162 Md. App. 599, 608-12 (2005). That is what the court did here.

Father's claim that the court reporter could not properly transcribe the hearing is also unavailing. There is no evidence that the accuracy of the record was affected, in any meaningful way, by Mother's alleged inaudibility.

G.

Father next claims that the trial court "appeared to formulate its findings based on personal opinions rather than adhering to established legal principles and considering the evidence presented." Father argues that the court's decision to grant Mother full discretion over his access to E., and its decision to impose restrictions on his social media, "appears capricious and arbitrary, devoid of legal basis or sound reasoning." Father also argues that the court "did not provide any explanation for its decision."

Father's claims are again belied by the record. We are convinced that the court engaged in a thoughtful, thorough analysis of the evidence presented and the circumstances of the case, all with a keen eye toward reaching a reasonable decision based on E.'s best

interest. And, despite Father's baseless claims to the contrary, the court provided a lengthy explanation for its decision. That decision was consistent with all relevant legal principles and was not clearly erroneous.

H.

Father's final claim is that the trial court exhibited bias when it stated that Father's petition for contempt and motion for modification were filed out of retaliation. Father argues that the court's conclusion lacked "both evidence and legal foundation" and "may have resulted in prejudicial treatment."

We are unpersuaded by Father's argument, as we do not agree that the court's conclusion lacked evidentiary support. Father filed his petition for contempt and motion for modification immediately after Mother filed her motion for modification. In filing those motions, Father claimed that he wanted additional access time and that Mother was impeding the access time to which he was entitled. But, according to Mother, Father had been inconsistent at best in his efforts at gaining access to E. up to that point. Mother testified that in the nine years since that order was entered, Father had exercised his right to dinner visits only "two or three times"; that Father would frequently miss his weekend visits; and that, in 2019, Father moved to New Mexico, where he stayed for two years, seeing E. only twice in that time. In addition, Father failed to attend multiple court hearings after filing his motions, and one of those was the merits hearing. From that, a reasonable inference could be made that Father had an ulterior motive in filing his petition for contempt and motion for modification. It was not unreasonable, therefore, for the court to

conclude that Father may have filed the two motions to retaliate against Mother after she filed her motion for modification.

Assuming, purely for the sake of argument, that the court's conclusions were improper, we are not convinced that Father was prejudiced. Because Father failed to attend the merits hearing, the court had no basis to grant either of his motions. Moreover, to the extent that the court's comments could be construed as biased, we note that the comments came at the end of the court's oral findings, after the court had made its decisions regarding custody. We therefore fail to see how those comments could have affected the court's decision. That the court's comments "may have resulted in prejudicial treatment," as alleged by Father, is insufficient to constitute prejudice.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; APPELLANT TO PAY THE COSTS.