Circuit Court for Prince George's County
Case No. CAD19-05754

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0225

September Term, 2021

DANIEL PERPIGNAN

v.

LAVETTA BENEMON

Nazarian,
Zic,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: July 18, 2022

This case concerns a custody dispute between Daniel Perpignan, appellant ("Father"), and Lavetta Benemon, appellee ("Mother"), over their minor child ("Child") born in August 2018. In April 2021, the Circuit Court for Prince George's County entered an order modifying the parties' custody arrangement, awarding sole physical custody of Child to Mother. Father appealed, presenting the following three questions for our review, which we have slightly rephrased[1]:

1. Whether the circuit court erred or abused its discretion in finding a material change in circumstances and modifying custody without delineating the basis for its material change finding.

2. Whether the circuit court erred by concluding that Father was unfit to have custody of Child because of his post-traumatic stress disorder diagnosis in 2003.

3. Whether the circuit court erred or abused its discretion by declining to consider testimony that Mother's refusal to vaccinate Child was a material change in circumstances and it was in Child's best interest to award tie-breaking authority to Father.

[1] Appellant phrased the questions presented as follows:

> A. Whether the [c]ourt abuse[d] its discretion when it ruled that, based on the facts and evidence, a material change in circumstances had occurred and it was in the best interest of the minor child to modify the August [20], 2019 Custody Order but did not specifically delineate what the material change in circumstances was?
>
> B. Whether the [c]ourt was clearly erroneous when it concluded that Appellant was unfit to have custody of the minor child because the Appellant was diagnosed with post-traumatic stress disorder ("PTSD") in 2003?
>
> C. Whether the [c]ourt abused its discretion when it refused to consider testimony that Appellee's refusal to vaccinate the minor child was a material change in circumstances and it was in the best interest of the minor child that the tie-breaker authority be giv[en] to Appellant?

For the reasons provided below, we vacate the circuit court's April 1, 2021 order and remand the case for further proceedings not inconsistent with this opinion.

BACKGROUND[2]

On August 1, 2019, a merits hearing was held before the circuit court on the issues of custody, access, and child support. Following the hearing, the court issued an order on August 20, 2019, granting the parties shared physical custody and joint legal custody of Child with Mother "having tie-breaker authority for educational, medical, and religious decisions." The court specified that, prior to exercising her tie-breaking authority, Mother must first consult with Father and then, if such consultation fails, attend mediation with Father. The court also ordered, among other matters, that Father make child support payments of $444 each month.

On October 9, 2020, Father filed an Amended Motion for Contempt and for Modification of Custody. In his motion, Father requested that the circuit court "remove the tie-breaker authority from [Mother] and grant it to [him]."[3] Father asserted that Mother's various violations of the August 2019 order constituted a material change in circumstances warranting modification. Specifically, he stated that Mother enrolled Child in a new daycare center, starting sometime after August 23, 2019, and reduced the

[2] Our summary of the facts relevant to this appeal is based on the portions of the circuit court record attached to Father's brief. Mother's counsel requested an extension to file her brief, which was granted, but did not ultimately file a brief.

[3] Additionally, Father requested that the circuit court hold Mother in contempt and order Mother to "to pay back the additional money [he] was forced to pay for childcare."

number of days Child attended daycare without consulting him. Father was then forced to pay for childcare despite this expense being included in the child support calculation. Father also claimed that Mother, on September 12, 2019, "filed a false protective order for the sole purpose of interfering with [his] access time," which she later voluntarily dismissed. And he referenced Mother's refusal to vaccinate Child or to discuss this matter with him. Ultimately, Father alleged that Mother's "clear abuse of the tie-breaking authority and refusal to vaccinate [Child] is not in the best interest of [Child]."

Mother filed a Counterclaim to Modify Custody, Access, and Child Support and for Contempt. She sought "full" physical and legal custody of Child, stating that "circumstances have changed[] and the [original] [o]rder is no longer in the best interest of [Child]."[4] Mother explained that Child's daycare provider filed for a peace order against Father in August 2020, alleging that he harassed and made "fraudulent and malicious reports" about her. The peace order, Mother continued, was granted on a temporary basis and then dismissed in September 2020 "because the court determined that there was no likelihood of continued harassment since [Father] agreed to cease and desist all contact with [the childcare provider]." Father, however, allegedly continued harassing the childcare provider "by filing repetitive and fraudulent complaints with the licensing board" and picking up and dropping off Child at the daycare center. Mother

[4] In addition to modifying custody, Mother requested that the circuit court order Father to pay child support according to a child support calculation under the new custody arrangement, order Child Protective Services to provide the court a report of its investigation into Father, and hold Father in contempt for noncompliance with the August 2019 order.

also emphasized the parties' inability to communicate about matters affecting Child and detailed Father's violations of the original court order, including denying Mother FaceTime access with Child, refusing to pay Child's medical bills through his insurance, and withholding Child during scheduled exchanges. And she referenced an "ongoing [Child Protective Services] investigation into [Father]'s parenting . . . because of frequent injuries [Child] displays after being in [his] custody."

On February 8, 2021, the parties appeared before the circuit court for a modification and contempt hearing. At the hearing, Father testified about the problems concerning Child's daycare arrangements. He testified that Mother enrolled Child in a new daycare program and reduced Child's attendance days from five to three days a week without first consulting him.[5] Because Child's new daycare schedule did not cover Father's access days, he was forced to pay $75 per day, totaling an additional $600 per month, for childcare. Father confirmed that Mother filed for a protective order against him in September 2019 that was later dismissed by the court.

Father testified that he noticed bruises on Child while enrolled in the new daycare and that he attempted to discuss this with the daycare owner. On one occasion, he also observed a gash on Child's knee and when he inquired about the injury, the daycare owner would not provide a response. Father testified that he made a formal complaint

[5] During the hearing, Father's counsel produced an email dated September 18, 2019 that Father sent to Mother and the owner of Child's new daycare center. In the email, Father states that he learned of Child's reduced enrollment days while meeting with the owner earlier that day.

against the daycare center to Prince George's County when his attempts to discover the cause of Child's injuries were unsuccessful. As an additional reason, he explained that he decided to file the complaint after observing employees of the daycare center taking pictures of Child in his diaper. Father also testified that Child Protective Services received a report that Child was potentially being abused in his care but after Child Protective Services investigated, the case was dismissed.

During the hearing, Father stated that following his complaint, the daycare center filed a petition for a peace order against him that was eventually dismissed by the court after an evidentiary hearing.[6] Child was withdrawn from that daycare center in the summer of 2020. Father further testified that while searching for a new daycare for Child, he sent Mother a list of potential options. When he did not receive a response from Mother, Father enrolled Child in one of the listed daycare programs during his access days. Father testified that Mother later unenrolled Child from that childcare center. At the time of the hearing, Child was enrolled in a different daycare program. Father admitted that Mother offered to care for Child while he worked but he declined her offer believing that it was not a "wise decision."

Father also provided testimony on the issue of vaccinating Child. He stated that Child had not received any of his immunizations. He testified that he "believe[s] that

[6] The owner of the daycare center that filed for the peace order testified on behalf of Mother at the modification and contempt hearing. The owner confirmed that Father raised concerns about Child's injuries and about the removal of Child's clothing. She explained that they removed Child's clothing to inspect him upon arriving at the daycare center.

[Child] should have the minimum requirement of immunizations" and that he attempted to discuss this with Mother.[7] At the hearing, Mother testified that while she was pregnant, she and Father initially agreed not to vaccinate Child. She also testified that Child's pediatrician has recommended vaccinating him but that she and Father decided not to do so. When asked on cross examination if she intends to vaccinate Child, Mother stated that she is unsure.

Additionally, Father testified that he was diagnosed with post-traumatic stress disorder ("PTSD") in 2003. Father stated that his PTSD is "minor" and his "[s]ymptoms can be various things from depression, loss of friends[,] and being away from family." He confirmed that he is not on medication for his PTSD and that it has not been recommended that he take medication.

On April 1, 2021, the circuit court delivered its oral ruling, denying both parties' motions for contempt and granting, in part, Father's Amended Motion for Modification of Custody and Mother's Counterclaim to Modify Custody, Access, and Child Support. The court began by announcing its "find[ing] that there ha[d] been a material change in circumstance" with no further explanation of what that material change in circumstance was. It then proceeded to apply the best interest of the child standard and ultimately decided to modify custody by awarding Mother sole physical custody of Child:

> The [c]ourt looks at the following factors when it looks at whether it's in the best interests of the child, even though

[7] On motion by Father's counsel, the circuit court admitted into evidence a photograph of a text message conversation between Father and Mother in November 2019 in which Father discusses immunizing Child.

there's a material change in circumstance, now is it in the best interests of the minor child to change the custody or modify the schedule.

So the [c]ourt looked at the physical custody factors and many of those factors are found in Montgomery County [v.] Sanders.

So one of the factors is the fitness of the parents.

* * *

. . . [Father] suffers from PTSD which often results in depression, withdrawal and isolation.

[Mother] is a fit mother who takes the minor child's health and safety into consideration.

Factor number two, character and reputation of the parties.

[Mother] poses no issue as with regard to the daycare center and [the daycare owner].

There was detailed testimony of [Father]'s request toward [the daycare owner] and that caused problems at the daycare. He was difficult at the daycare and harassed the owner and that actually forced the owner to apply for a Protective Order. And [Father] agreed not to return to the daycare, but returned later to the daycare despite his promise.

Number three, desires of the natural parents and agreement between the parents.

The parties agree that the current custody and visitation schedule places the minor child in an unstable position; however the parties have been unable to come up with any agreement as to how that stability would be reached between the parties.

Factor number four, potentiality of maintaining natural family relationship.

[Father], again, suffers from PTSD which causes him to suffer from depression, withdrawal from friends and family, as well as isolation.

[Father] further refused [Mother] access to the minor child on his days, repeatedly ignoring her calls, and when FaceTime or videoconferencing, telephones, it appeared as though the phone was up at the ceiling and there was no effort to [e]nsure that [Mother] had a meaningful conversation with the minor child.

* * *

. . . Next factor is potentiality of maintaining natural family relationships.

Again, since [Father], wh[o] is the [p]laintiff in this case, oftentime[s] is depressed and isolated, that makes the family relationships difficult and it makes the family relationships difficult when the phone is at the ceiling and the child can't even see the mother.

A two-year-old needs the help and assistance of an adult when that's happening.

Preference of the child. This is a two-year-old child, so the preference[] of the child is not known.

Factor number six is the material opportunities affecting the future life of the child.

Both parents have the financial means to provide for the minor child.

Factor number seven is the age, health and sex of the child.

This is a two-year-old healthy boy.

Factor number eight, residence of parents and opportunity for visitation.

There . . . was not testimony regarding this during this [c]ourt proceedings, but in prior [c]ourt proceedings there was testimony that they live approximately 30 miles apart.

Factor number nine, length of separation from the natural parents.

That's not applicable in this case.

Factor number 10, prior voluntary abandonment or surrender.

There was no testimony with regard to this factor.

Also when you're looking at whether you're going to change legal custody, you look at factors that you will find in Taylor [v.] Taylor.

Factor number one was the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare.

The [c]ourt finds that with dedication and understanding, that is -- that this is about the best interests of the child, the [c]ourt believes that the parties can reach[] shared decisions in the best interests of the minor child.

Factor number two, willingness of parents to share custody.

There was testimony that neither parent is willing to share custody. They both want sole custody.

Also in Taylor [v.] Taylor you'll find the fitness of the parents, but we discussed that earlier, so the [c]ourt's not going to assess it again here.

Factor number four, relationship established between the child and each parent.

Again, from the earlier hearings that the [c]ourt found there was testimony that both parents have a loving relationship between the child and each parent supports the child. There is no testimony contrary to that in today's hearing.

Preference of the child. Again, . . . this is not known. Child is too young to know the preferences.

Factor number six, potential disruption of child's social and school life.

The child is not of age to have a social or school life. It's a two-year-old child.

Factor number seven, geographic proximity of parental homes.

Approximately 30 minutes apart.

Factor number eight, demands of parental employment.

Both parents are employed and currently working from home due to COVID-19.

Factor number nine, age and number of children.

One child, age two.

Factor number 10, sincerity of parent's request.

The [c]ourt finds that the testimony of . . . [M]other is sincere and credible.

Factor number 11, financial status of the parents.

Both parents are financially able to provide for the child.

Factor number 12, impact on [s]tate or [f]ederal assistance.

> That is not applicable in this case.
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> Factor number 13, benefit to parents.
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> Both parents will benefit by having a stable schedule where they can be involved in the minor child's life.

The court also delineated Father's access and visitation schedule with Child. Thereafter, the court issued an order dated April 1, 2021 memorializing its ruling. Father noted this appeal.

STANDARD OF REVIEW

In child custody disputes, Maryland appellate courts apply three standards of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] 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.

Gillespie v. Gillespie, 206 Md. App. 146, 170 (2012) (alterations in original) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). "A trial court's findings are 'not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion.'" *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). In analyzing the court's conclusion, we must "give due regard to the opportunity of the trial court to judge the credibility of the

witnesses." Md. Rule 8-131(c). We also recognize that "[a]n abuse of discretion occurs where '"no reasonable person would take the view adopted by the [trial] court" or when the court acts "without reference to any guiding rules or principles."'" *Azizova*, 243 Md. App. at 372-73 (second alteration in original) (quoting *Santo v. Santo*, 448 Md. 620, 625-26 (2016)).

DISCUSSION

Father challenges, among other issues, the circuit court's finding that a material change in circumstances occurred and modification of the August 2019 order was warranted. He argues that the court abused its discretion by making this ruling "without first stating what the material change in circumstances was." Father asserts that "[i]t is unclear exactly what the court deemed to be a material change."

When faced with a request to alter a prior custody order, "courts employ a two-step analysis." *McMahon v. Piazze*, 162 Md. App. 588, 593-94 (2005). First, the court must "determine[] whether there has been a material change in circumstance." *Jose v. Jose*, 237 Md. App. 588, 599 (2018). "A change in circumstances is 'material' only when it affects the welfare of the child." *McMahon*, 162 Md. App. at 594. The Court of Appeals has explained that the requirement of a showing of material change ensures that custody orders are "afforded some finality." *McCready v. McCready*, 323 Md. 476, 481 (1991) (stating that "[a] litigious or disappointed parent must not be permitted to relitigate questions of custody endlessly upon the same facts"). As such, "any reconsideration of a [custody] decree should emphasize changes in circumstances which

have occurred subsequent to the last court hearing." *Id*. (quoting *Hardisty v. Salerno*, 255 Md. 436, 439 (1969)).

Second, if the court finds that a material change has occurred, it then "consider[s] the best interests of the child as if the proceeding were one for original custody." *McMahon*, 162 Md. App. at 594. This Court, however, has cautioned that if

> the evidence of change is not strong enough, i.e., either no change or the change itself does not relate to the child's welfare, there can be no further consideration of the best interest of the child because, unless there is a material change, there can be no consideration given to a modification of custody.

Wagner v. Wagner, 109 Md. App. 1, 28-29 (1996) (reiterating that "unless a material change of circumstances is found to exist, the court's inquiry ceases").

In the instant appeal, the circuit court stated on the record that it "f[ound] that there ha[d] been a material change in circumstance" without identifying that material change. We recognize that "the court need not articulate every step of the judicial thought process in order to show that it has conducted the appropriate analysis." *Gizzo v. Gerstman*, 245 Md. App. 168, 195-96 (2020). But the court provided no further explanation as to the basis for its material change finding in either its oral ruling or in its subsequent order. Without knowing the court's reasoning for determining that there was a material change, we cannot conduct a meaningful review of that finding and then proceed to review its decision modifying the custody arrangement. *See Braun v. Headley*, 131 Md. App. 588, 610 (2000) ("[U]nless a material change of circumstances is found to exist, the court's inquiry must cease."). We therefore vacate the April 1, 2021

order and remand the case so that the circuit court can provide support for its ruling. *See Maddox v. Stone*, 174 Md. App. 489, 502 (2007) ("Although the abuse of discretion standard for appellate review is highly deferential to the many discretionary decisions of trial courts, we nevertheless will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the exercise of discretion.").

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.