Circuit Court for Charles County
Case No. 08-C-13-000776

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0735

September Term, 2021

---

TOMEKA JOHNSON

v.

HORATIO NUNN

---

Graeff,
Friedman,
Eyler, Deborah S.,
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Friedman, J.

---

Filed: February 22, 2022

Appellant, Tomeka Johnson, filed a second petition to modify the custody order granting appellee Horatio Nunn primary physical custody of the parties' minor child. Following a hearing, the Circuit Court for Charles County dismissed Johnson's petition. For the reasons that follow, we affirm the dismissal.

## FACTUAL BACKGROUND

Johnson and Nunn were divorced in 2014. In those proceedings, Nunn was awarded primary physical custody of the parties' minor son,[1] and Johnson was awarded custody every other weekend with liberal visitation. The court also ordered that Johnson and Nunn were to have joint legal custody, with tie-breaking authority to Nunn.

In 2018, Johnson filed a motion for contempt and her first petition to modify the custody order, asserting that Nunn was refusing to comply with the order for liberal visitation, was only allowing her to see their son every other weekend, was making decisions without consulting Johnson, and that Nunn had problems with drugs and alcohol, including having received a conviction for driving while intoxicated. Following a hearing, in December 2018 the court ordered that Nunn would retain primary physical custody, but the visitation schedule would be modified. During the school year, their son would be with Nunn during the week and spend Wednesdays and every other weekend with Johnson. During the summer months, the court ordered that the schedule would reverse, so that their son would be with Johnson during the week and spend every other weekend with Nunn.

[1] In addition to the minor child whose custody is at issue in the current petition, the parties also have an older child who is emancipated and no longer residing with either parent.

On December 15, 2020, Johnson filed a second petition to modify custody, alleging that "Nunn's alcoholism has continued unabated, to the detriment of the minor child's mental and emotional well-being and general health." At a hearing on her petition, Johnson presented evidence that she had observed Nunn under the influence of alcohol on several occasions, that abusive language was being used in front of the minor child, and that Nunn was interfering in her communication with the minor child. At the conclusion of the hearing, the circuit court found that there had been no material change in circumstances and dismissed Johnson's petition to modify custody.

Johnson now challenges that the circuit court erred in (1) failing to rule on her motion to compel written discovery in advance of the hearing, (2) denying her motion to appoint a best interest attorney, (3) denying her petition to modify custody, and (4) excluding video evidence.

## DISCUSSION

### I. MOTION TO COMPEL DISCOVERY

Several months after filing her second petition to modify custody, Johnson electronically filed and served discovery requests on Nunn. Although Nunn's attorney acknowledged receipt of the requests, no discovery responses were produced. Johnson later filed a Motion to Compel Discovery and Motion for Sanctions. In her first issue, Johnson contends that the circuit court erred in failing to rule on this motion.

In the absence of waiver, failure of the court to rule on a motion can be reversible error. *Bennett v. State*, 252 Md. App. 549, 576-77 (2021); *Birkey Design Grp., Inc. v. Egle*

*Nursing Home, Inc.*, 113 Md. App. 261, 271 (1997). In this case, however, we conclude that Johnson has waived any complaints regarding the motion to compel.

During the hearing, both parties briefly complained about how the other had behaved during discovery, but neither party asked anything of the court nor made the court aware that there were any pending motions. Before a trial court can commit error by failing to rule on a motion, "[t]he motion to be decided must be brought to the attention of the trial court." *White v. State*, 23 Md. App. 151, 156 (1974). By failing to bring the motion to the trial court's attention, Johnson waived her right to a ruling. We, therefore, conclude that it was not error for the court to not address the motion.

## II. MOTION TO APPOINT BEST INTEREST ATTORNEY

In conjunction with her petition to modify custody, Johnson also filed a motion to appoint a best interest attorney for the minor child. That motion was denied after a hearing. In her second issue on appeal, Johnson asserts that she presented enough evidence showing the need for the minor child to have his own attorney such that the court's decision simply "defies logic." The record does not support Johnson's position.

Section 1-202 of the Family Law article provides that "[i]n an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court *may* … appoint a lawyer who shall serve as a best interest attorney to represent the minor child." MD. CODE, FAM. LAW ("FL") § 1-202(a)(1)(ii) (emphasis added). In conjunction with FL § 1-202, Maryland Rule 9-205.1 lists eleven factors that a court should consider to determine whether appointing a best interest attorney is appropriate:

(1) request of one or both parties;

(2) high level of conflict;

(3) inappropriate adult influence or manipulation;

(4) past or current child abuse or neglect;

(5) past or current mental health problems of the child or party;

(6) special physical, educational, or mental health needs of the child that require investigation or advocacy;

(7) actual or threatened family violence;

(8) alcohol or other substance abuse;

(9) consideration of terminating or suspending parenting time or awarding custody or visitation to a non-parent;

(10) relocation that substantially reduces the child's time with a parent, sibling, or both; or

(11) any other factor that the court considers relevant.

MD. RULE 9-205.1(b). Because the decision to appoint a best interest attorney is discretionary, we review the court's ruling for an abuse of that discretion only. *Garg v. Garg*, 393 Md. 225, 237-38 (2006).

Prior to the merits hearing on Johnson's motion to modify custody, the court held a preliminary hearing on Johnson's motion to appoint a best interest attorney. At the hearing, Johnson's counsel argued that because there was a high level of conflict between the parties, a best interest attorney was necessary to "interview both of the parties," determine what was "really going on" in Nunn's home, and speak for the minor child's wishes. In support of the request, Johnson's counsel described circumstances such as continued alcohol abuse by Nunn, unmet medical needs of the minor child including treatment for eczema and the replacement of lost eyeglasses, discord between the minor child and Nunn's fiancé, and the minor child not having enough structure at Nunn's home to keep up at school.

The court noted that most of these issues would be relevant to the merits of the petition for modification, but, in the court's opinion, did not establish any of the factors relevant to the appointment of a best interest attorney. The court repeatedly referred back to the factors listed in Rule 9-205.1 and asked if Johnson had anything to add that would apply to those factors. At the conclusion of the hearing, although the court agreed that there was a high level of conflict between the parties, it found that Johnson had failed to allege facts that would support any other factor in favor of appointing a best interest attorney. The court therefore denied Johnson's motion and moved on to the merits hearing.

An abuse of discretion occurs when a judge acts in an arbitrary or capricious manner. *Garg*, 393 Md. at 238. Here, it is apparent from our review of the transcript that the court was mindful of the factors listed in Rule 9-205.1 and evaluated Johnson's arguments in relation to each factor. We cannot say that there was anything arbitrary or capricious about the court's actions. We conclude, therefore, that the circuit court did not abuse its discretion in denying Johnson's motion for appointment of a best interest attorney.

## III. DENIAL OF PETITION TO MODIFY CUSTODY

Next, we address Johnson's complaint that the circuit court erred in dismissing her petition to modify custody. Specifically, Johnson contends that the court was required to conduct a full best interest analysis to resolve her motion for modification of custody. We disagree.

Custody orders, though subject to modification, are nonetheless afforded a certain amount of finality. *McCready v. McCready*, 323 Md. 476, 481-82 (1991); *McMahon v. Piazze*, 162 Md. App. 588, 596 (2005) (citing *Domingues v. Johnson*, 323 Md. 486, 498

(1991)). Thus, when a motion to modify custody is filed, the court engages in a two-step process to determine whether modification is warranted. *Jose v. Jose*, 237 Md. App. 588, 599 (2018); *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012). The court first determines whether there has been a material change in circumstances since the previous custody order was entered, and if so, the court next considers whether a change in custody would be in the best interest of the child. *Jose*, 237 Md. App. at 599; *McMahon*, 162 Md. App. at 593-94. To be considered a "material change of circumstances," the change must be something that affects the welfare of the child. *Gillespie*, 206 Md. App. at 171. The burden is on the moving party to establish both that there has been a material change, and that because of that change it is now in the best interest of the child for the custody arrangement to be modified. *Id.* at 171-72.

The requirement that the party seeking modification of custody must show that a material change has occurred since the last custody determination helps to maintain stability in the child's life and minimize unnecessary upheaval. It also helps to prevent discontented parents from endlessly relitigating the same facts in the hope of achieving a different outcome. *McCready*, 323 Md. at 481-82; *McMahon*, 162 Md. App. at 596. The questions of whether there has been a material change and what is in the best interest of the child will often overlap. After all, it can be difficult to determine whether a change is material without considering how it will affect the welfare of the child. *McCready*, 323 Md. at 482. But even though the best interest question is always present, the court's analysis for modification must "emphasize changes in circumstances which have occurred subsequent to the last court hearing." *McCready*, 323 Md. at 481 (cleaned up).

Johnson petitioned for modification of the custody order on the grounds that "Nunn's alcoholism has continued unabated, to the detriment of the minor child's mental and emotional well-being and general health." At the hearing, Johnson testified that since the most recent custody order was entered, on one occasion she believed that she observed Nunn operating a vehicle under the influence of alcohol, and on several occasions she observed Nunn in what she believed to be a state of inebriation. Despite the concerning nature of this testimony, it is repetitive of Johnson's first petition for modification. In deciding that petition, the facts presented to the court included evidence that Nunn had been convicted of driving while intoxicated. There is nothing in the record here to distinguish the grounds of Johnson's current petition from those raised by her previous petition. "In the limited situation where it is clear that the party seeking modification of a custody order is offering nothing new, and is simply attempting to relitigate the earlier determination, the effort will fail on that ground alone." *Id.* at 482. As a result, it was not error for the court to dismiss Johnson's petition without conducting a best interest analysis.

## IV. EXCLUSION OF EVIDENCE

Finally, we address Johnson's argument that the circuit court erred in refusing to admit into evidence four cellphone videos that she asserted were recorded by the minor child and showed Nunn in a state of inebriation.[2] The court excluded the videos on the

[2] In her brief, Johnson briefly mentions that she believes the circuit court also erred in excluding "evidence reflecting Nunn's verbal abuse towards" her. Although Johnson does not identify a specific piece of evidence, from our review of the record it appears she is challenging the court's exclusion of a text message that Nunn had sent to her. The court excluded the message on the grounds that because the minor child was not involved with

grounds that they could not be sufficiently authenticated because Johnson could not establish when they were recorded. Johnson argues that her inability to establish when the videos were recorded affected their weight but not their admissibility, and thus the court erred by refusing to admit them. We are not persuaded.

Authentication of evidence is governed by Maryland Rule 5-901, which states that for evidence to be admissible, it must be authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." MD. RULE 5-901(a). A video can be authenticated either through the first-hand knowledge of a testifying witness, or under the "silent witness" theory of admissibility, wherein the video or photograph can establish its own probative effect. *Jackson v. State*, 460 Md. 107, 116 (2018); *Washington v. State*, 406 Md. 642, 652 (2008). We review a trial court's ruling on whether there is sufficient authenticating evidence under an abuse of discretion standard. *Carpenter v. State*, 196 Md. App. 212, 230 (2010).

During the hearing, Johnson explained that she had given a cellphone to the minor child to facilitate communication while he was with Nunn, and that she regularly checked the phone when he returned from Nunn's house. She testified that it was during these

or aware of the message, it was not relevant to the modification. Irrelevant evidence is inadmissible, MD. RULE 5-403, and we cannot say that the court abused its discretion by finding that the message was not relevant. *See In re Adriana T.*, 208 Md. App. 545, 568-69 (2012) (noting that "the trial court has wide discretion when considering the relevancy of evidence"). We also note that despite the court's exclusion of the text message, Johnson was able to present her argument by testifying extensively about Nunn using abusive language towards her in front of the minor child. Thus, any potential relevance that the text message had would have been cumulative of other evidence. MD. RULE 5-403.

routine checks that she found videos that the child had recorded, purportedly showing Nunn in a state of inebriation and foul language being used between Nunn and his fiancé.

As discussed above, because this matter was before the court on a motion to modify the existing custody order, Johnson needed to show that there was a material change in circumstances since the last custody order was entered. The videos were therefore only relevant if they were recorded during that specific time period. But at the hearing, Johnson failed to provide any information to establish when the videos were taken. She did not know when they were recorded, and she could not remember when exactly she discovered them. In addition, the video files themselves did not include information about when they were created. The only date information available to the court was the date that each video was uploaded to the "cloud."

The relevance of the videos was almost entirely dependent on when they were recorded. Yet, that was precisely the information that Johnson could not provide. As a result, we cannot say that it was an abuse of discretion for the court to conclude that the videos were not sufficiently authenticated and therefore inadmissible.

## CONCLUSION

For the foregoing reasons, we conclude that the circuit court did not abuse its discretion in dismissing Johnson's motion for modification of custody.

**JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**