Circuit Court for Montgomery County
Case No. FL-149346

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 918

September Term, 2019

LUIS MANZANO

v.

DORIS TREJO

Meredith,
Berger,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: January 16, 2020

Doris Trejo and Luis Manzano married in 1998, divorced in 2012, and have a minor child, G. At the time of the divorce, they entered a Settlement Agreement that the Circuit Court for Prince George's County merged into their Judgment of Absolute Divorce. The Settlement Agreement included provisions covering legal and physical custody. This appeal, brought by Mr. Manzano, challenges the Circuit Court for Montgomery County's recent decision to modify the agreed custody and visitation terms, primarily because, he contends, Ms. Manzano was precluded by her withdrawal of an earlier petition from trying again. We disagree and affirm.

I. BACKGROUND

A. The Settlement Agreement And The Consent Order.

Ms. Trejo and Mr. Manzano were married on September 20, 1998 in Florida. Their child, G, was born in 2004. They divorced on June 13, 2012, when they resided in Bowie. Their divorce decree, entered by the Circuit Court for Prince George's County, incorporated but did not merge a Settlement Agreement that granted Mr. Manzano and Ms. Trejo joint legal custody and gave Ms. Trejo primary physical custody, with visitation for Mr. Manzano. Mr. Manzano had G on Friday after school until Saturday at 9:00 p.m., and after G turned ten years old, Mr. Manzano got an additional weeknight. He chose Thursdays.

After the divorce, everybody moved: Ms. Trejo and G to Bethesda in December 2014, and Mr. Manzano to Virginia in July 2016. In the time after the divorce, though, their relationship and their ability to communicate both deteriorated.

On July 22, 2015, Ms. Trejo filed a Petition to Enforce Judgment of Absolute

Divorce and Modify Custody, still in the Circuit Court for Prince George's County. She sought sole legal custody, a modified visitation schedule, copies of Mr. Manzano's accounting information, and reimbursement for G's medical expenses. Mr. Manzano responded with a Counter-Motion to Modify Custody and Child Support, to Enforce Judgment of Absolute Divorce, and for Attorney's Fees. After discovery and litigation, the parties were able to reach a partial agreement. They asked the court to enter, and on August 5, 2016, it entered, a Consent Order that, among other things, modified child support and authorized the court to hold G's passport. The Consent Order provided that "other than the modification of child support and provisions provided herein, all other provisions in the parties' May 22, 2012 Settlement Agreement remain valid and enforceable." And, most importantly for our purposes, the Consent Order provided that Ms. Trejo's petition to modify custody and Mr. Manzano's counter motion—the filings initiating that stage of the litigation—"are both withdrawn without prejudice."

On November 14, 2017, Ms. Trejo filed a Complaint to Modify Custody, for Contempt and Enforcement, and for Related Relief, this time in the Circuit Court for Montgomery County. In this Complaint, the filing underlying this appeal, Ms. Trejo requested sole legal custody, or in the alternative, tie-breaking authority, a change in the custody schedule, and reimbursement for extra-curricular activities. She alleged further that Mr. Manzano had not paid child support for a year.

B. Trial

On June 22 and July 5, 2018, the parties appeared for trial. During his opening

statement, counsel for Mr. Manzano made an oral motion for judgment,[1] arguing that Ms. Trejo was seeking the extra money to "maintain her home" in Bethesda and that in any event the court was barred from considering evidence that predated the Consent Order because that order resolved the parties' custody disputes to that point. Ms. Trejo replied that under the Consent Order, "the parties specifically agreed that their respective pleadings . . . would be withdrawn without prejudice," and that their pre-Consent Order disputes relating to custody remained.

The court ruled that the Consent Order had not resolved their custody disputes and declined to dismiss the complaint:

> [T]his is kind of unusual language to me. Normally these things say this is a settlement agreement where the parties have settled all of their outstanding claims or [they] are thereby waived. In this case it indicates that this is a consent order, it doesn't say that anyone has waived, it simply says plaintiff is withdrawing without prejudice claims. . . .

The result of the Consent Order, and the key point of contention here, was that the court could measure any change in circumstances from the time of the divorce, 2012, and could consider evidence from that point forward. Under Mr. Manzano's theory, the analytical starting point would have been the Consent Order, August 5, 2016.

Ms. Trejo then testified about difficulties with the custody schedule and the parties' deteriorating communication. *First*, regarding physical custody, she stated that the parties' respective moves had made it difficult to transport G between the two homes because the

[1] He renewed this motion at the close of the case.

drive could take an hour-and-a-half. According to Ms. Trejo, G struggled to do his homework on the nights he was with Mr. Manzano because of the long commute from school to Mr. Manzano's home. She testified that she wanted to enroll G in a basketball program that met on Tuesdays and Thursdays, but Mr. Manzano refused and told her "do not enroll [him] in days where he's with me."[2]

Ms. Trejo described how communications between her and Mr. Manzano had crumbled since 2012. She stated that she and Mr. Manzano "don't agree to anything" and that "things got really ugly." Ms. Trejo called Mr. Manzano "explosive," and she introduced emails describing her in angry and insulting terms (reproduced below as written, but with translated Spanish words in italics):

> - [It's] funny how a dumb ass barefoot fucking indian who was born in a hut thinks that you can spend and spend and think that it is not going to come and bit[e] you in the ass. . . . Go fuck yourself.
> - *You don't know how frustrating it is to talk to a retarded imbecile* and unsophisticated person such as yourself.
> - I wish when [G] gets old *that he treats you like the shit you are*.[3]

Mr. Manzano didn't dispute that he sent these emails, but countered that he had stopped using that language in 2014, and that Ms. Trejo once referred to him as an "asshole" in a text message. Ms. Trejo described how, due to poor communication and her hesitation to

[2] At trial, Mr. Manzano flipped on this point, stating that he wouldn't pay for basketball because even though it was extracurricular, it wasn't a "school" activity. Later, he indicated that he doesn't have a problem with G participating in basketball.

[3] The record contains additional messages using similar language.

talk to Mr. Manzano, the two were unable to decide on a high school for G and that he wasn't registered as of the date of trial. She also testified that G's health insurance, for which Mr. Manzano was responsible under the 2012 Settlement Agreement, lapsed for about four months in 2017. He responded that he communicated the change in health care plans and that it caused only a one-month lapse.

After taking the case under advisement, the court issued a written ruling finding a material change in circumstances and that it was in the best interest of the child to modify physical custody and to modify legal custody to give Ms. Trejo tie-breaking authority in case of disagreements between them. Mr. Manzano appeals. We supply additional facts as needed below.

II. DISCUSSION

Mr. Manzano raises one question on appeal that we rephrase: did the circuit court err when it measured the change in the parties' circumstances from the date of their original Settlement Agreement rather than the Consent Order?[4] His brief also argues, albeit without listing a separate Question Presented, that Ms. Trejo failed to establish a material change

[4] Mr. Manzano phrased his Question Presented as follows:

> Did the trial court commit legal error and abuse its discretion when it admitted evidence dating back to the parties' divorce rather than the August 5, 2016 Consent Order entered in the Circuit Court for Prince George's County?

Ms. Trejo rephrased that Question as:

> Did the Circuit Court err in finding a material change in circumstances had occurred by allowing evidence to be admitted that dated back to the Judgment of Absolute Divorce?

in circumstances that would justify the court's change in legal and physical custody. We disagree on both counts.

A. The Circuit Court Correctly Measured Changed Circumstances From The May 22, 2012 Settlement Agreement.

When a circuit court considers modifying legal and physical custody, it undertakes a two-step analysis. *In re Deontay J.*, 408 Md. 152, 165–66 (2009). *First*, the "threshold—but not paramount—issue is the existence of a material change." *Wagner v. Wagner*, 109 Md. App. 1, 29 (1996). *Second*, if the court finds a material change, it considers whether the requested modification, or some other variation, serves the best interests of the child. *Jose v. Jose*, 237 Md. App. 588, 599 (2018). These two analyses are interrelated, and "[d]eciding whether [] changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child." *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005) (*quoting McCready v. McCready*, 323 Md. 476, 482 (1991)).

This case, though, presents a threshold question: the proper time period for measuring whether the circumstances had changed. Mr. Manzano asserts that the clock began with the 2016 Consent Order and that the court should not have considered evidence from before that. The parties had filed cross-complaints seeking in Prince George's County in 2015, he argues, and the Consent Order was a "final order" resolving those disputes up to that point. Ms. Trejo responds that the court properly considered evidence dating back to the 2012 Settlement Agreement because the 2016 Consent Order didn't resolve their disputes. Indeed, she says, the Order itself states that the claims were withdrawn "without prejudice." Moreover, she argues that even if the evidence from before the Consent Order

was precluded, there was sufficient evidence *after* the Consent Order to support the trial court's finding that there was a material change in circumstances. We agree with Ms. Trejo.

To be sure, the custody arguments the parties made ahead of the Consent Order were very similar to the arguments they're making now, although the current Complaint added a contempt claim against Mr. Manzano. By means of comparison, in Ms. Trejo's June 22, 2015 Petition to Enforce Judgment of Absolute Divorce and Modify Custody, she requested "modification of legal custody and the visitation schedule made by the parties in 2012." Ms. Trejo sought sole legal custody but added a request for tie-breaking authority if sole custody wasn't awarded. She requested that Mr. Manzano's visitation center around weekends. She also alleged that Mr. Manzano was not paying for medical expenses and that he had not given her copies of his accounting information as required under the 2012 settlement agreement. On the other hand, in Ms. Trejo's 2017 Complaint, she requested sole legal custody and modification of the visitation schedule again. She also raised that Mr. Manzano had stopped paying child support and G's extracurricular activity expenses.

But the 2016 Consent Order did not resolve any custody disputes—it expressly preserved them:

> ORDERED that Plaintiff's Petition to Enforce Judgment of Absolute Divorce and Modify Custody (Docket No. 23) and Defendant's Counter-Motion to Modify Custody and Child Support, to Enforce Judgment of Absolute Divorce, and for Attorney's Fees (Docket No. 30) are both **withdrawn without prejudice** . . . .

(emphasis added). Without this language, the Consent Order *would have* resolved the custody disputes to that point, especially because the Order also provided that the terms of

the Settlement Agreement would remain in effect. So too if the Consent Order had withdrawn the claims *with* prejudice or had provided that any claims not brought by the time of that order were waived. The trial court said as much:

> Okay. So I guess on the first issue I'm looking at the wording of this consent order dated August 5, 2016 and it indicates that a complaint was filed [] in Prince George's County seeking to enforce a judgment of absolute divorce and to modify custody. And the defendant apparently filed a countermotion to modify custody and child support.
>
> And, curiously, this is kind of unusual language to me. Normally these things say this is a settlement agreement where the parties have settled all of their outstanding claims or are thereby waived. In this case it indicates that this is a consent order, **it doesn't say that anyone has waived [claims], it simply says that the plaintiff is withdrawing without prejudice claims**. . . .
>
> So at this point I'll, based on the language of this, I'll interpret this to mean that the parties didn't reach a settlement of all claims that existed at that time, but rather they entered into this consent order to resolve a couple of pending issues and **plaintiff withdrew her petition without prejudice to be able to refile**. And I guess that's what's happening now.
>
> So I won't dismiss the complaint based upon the fact that it's been previously litigated or settled under this consent order.

(emphasis added). We agree with the circuit court that the "withdrawn without prejudice" language unambiguously preserved the matters not resolved by the operative terms of the Consent Order and left them for another day, should anyone raise them, which Ms. Trejo did when she filed this Complaint to Modify Custody. And because the Consent Order did not address or resolve the earlier custody dispute, the court did not err in considering evidence dating back to the operative custody decree, which was the 2012 Settlement Agreement.

B. The Court Did Not Abuse Its Discretion When It Found A Material Change In Circumstances.

Second, and even if the trial court properly considered evidence from before the Consent Order, Mr. Manzano argues that Ms. Trejo failed to establish a material change in circumstances. We see no abuse of discretion in that decision.

We review child custody decisions against a three-part standard of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [current Rule 8-131(c)] applies. If it appears that the chancellor 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 chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

Jose, 237 Md. App. at 598 (*quoting Wagner*, 109 Md. App. at 39–40). We afford trial courts great deference in custody determinations, and their decisions are "unlikely to be overturned on appeal." *Domingues v. Johnson*, 323 Md. 486, 492 (1991). An abuse of discretion occurs when "no reasonable person would take the view adopted by the [trial] court," "when the court acts without reference to any guiding rules or principles," "when the court's ruling is clearly against the logic and effect of facts and inferences before the court," "when the ruling is violative of fact and logic," or when "its decision is well removed from any center mark imagined by the reviewing court." *Jose*, 237 Md. App. at 598–99 (*citing Santo v. Santo*, 448 Md. 620, 625–26 (2016)).

1. Legal Custody

Mr. Manzano contends that the court abused its discretion when it gave Ms. Trejo

tie-breaking authority "in the event the parties are unable to jointly reach a decision as it relates to the minor child." The court found that "the evidence and testimony proves that these parties, at the moment, are incapable of working together and communicating for the benefit of their child." The court grounded its conclusion on four separate findings:

- The parties' lack of communication resulted in three instances when G was supposed to be covered by Mr. Manzano's insurance but wasn't.
- Mr. Manzano was unreliable in communicating important information, like G's health coverage, to Ms. Trejo.
- Poor communication between Mr. Manzano and Ms. Trejo resulted in G not being enrolled in the desired school.
- Mr. Manzano used his "veto power" to thwart Ms. Trejo's effort to have G take a school entrance exam, which disqualified him from receiving financial aid.

These issues, the court found, amounted to a material change in circumstances that warranted the tie-breaking authority being given to Ms. Trejo.

The record amply supports the court's findings that the parents couldn't communicate effectively. In emails, Mr. Manzano had called Ms. Trejo a "greedy bitch," a "stupid moron," a "retarded Mayan," "a stupid dumb ass bitch," among other intemperate names. Because communication had become "very hard" and "got really ugly," Ms. Trejo testified that she had largely stopped talking to Mr. Manzano a year-and-a-half before trial. Mr. Manzano also asserted that Ms. Trejo once called him an "asshole." As a result, the record supported the court's finding that Mr. Manzano and Ms. Trejo had been unable to agree on where G should go to school, whether Mr. Manzano would pay for private school

as he agreed to in the 2012 Settlement Agreement, and whether Mr. Manzano was maintaining G's health insurance coverage. The court's findings relating to legal custody were not clearly erroneous, and the trial court's ultimate conclusion to grant Ms. Trejo tie-breaking authority was not an abuse of discretion.

2. Physical Custody

Finally, Mr. Manzano argues that the court abused its discretion when it modified physical custody. The 2012 Settlement Agreement provided that until G turned ten years old, Mr. Manzano would have physical custody "[e]very Friday beginning after school, if [Mr. Manzano] can pick [G] up from school, or at 7:00 PM until Saturday at 9:00 PM." Then, on alternate weekends, G would stay with Mr. Manzano through Saturday night and would return to Ms. Trejo at 6:00 p.m. on Sunday. After G turned ten, the settlement agreement gave Mr. Manzano one additional weeknight, which Mr. Manzano ultimately exercised on Thursdays. After trial, the court modified the 2012 schedule based on the following findings:

- The "travel logistics of both parties have changed due to their residential moves."
- Based on the current visitation schedule, G had been unable to complete school work during the week depending on which parent had custody that evening.
- The court found it "inconceivable that [Mr. Manzano] would preclude [G] from going to [Ms. Trejo's] home to complete his homework during instances when [Mr. Manzano] could not pick him up on time to start his visitation weekends with [G]."
- High school will create a more demanding schedule and workload.
- G will also have school activities and sports to add to

his weekly schedule.

Based on these findings, the court found that it would be in G's best interests for Mr. Manzano to have physical custody on alternating weekends, on which G would stay with Mr. Manzano from 7:00 p.m. on Friday through 7:00 p.m. on Sunday.

The record provides more than sufficient evidence to support the court's findings that the existing schedule made it difficult for G to finish his homework and participate in extra-curricular activities, such as basketball, during his days with Mr. Manzano. Ms. Trejo testified that after she moved to Bethesda and Mr. Manzano moved to Fairfax, Virginia, rush hour traffic in the area could make the commute between the two homes last between an hour and an hour-and-a-half. Because G's school was close to Ms. Trejo, he wouldn't arrive at Mr. Manzano's home on Thursday nights until late in the evening. Ms. Trejo testified that G had failed to complete assignments when he was at Mr. Manzano's home, and that he wanted to play basketball on a team that practiced on Tuesdays and Thursdays, but Mr. Manzano refused to let G participate on his nights. She testified as well that having no weekends with G had made travel and weekend activities difficult. Reasonable factfinders might reach different conclusions from these facts, but they fall well within the range of solutions a reasoning factfinder could reach on this record. The findings relating to physical custody were not clearly erroneous, and the trial court's decision to modify physical custody was not an abuse of discretion.

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