Circuit Court for Montgomery County
Case Nos. 166391FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1109

September Term, 2020

ROY SHAFFIN

v.

SHOSHANNA SCHECHTER

Fader, C.J.,
Arthur,
Berger,

JJ.

Opinion by Berger, J.

Filed: May 25, 2021

Roy Shaffin ("Father"), appellant, and Shoshanna Schechter ("Mother"), appellee, are the divorced parents of three minor children. In the Circuit Court for Montgomery County, Father filed a complaint to modify custody and visitation. After a hearing, the court ruled that Father had failed to meet his threshold burden of proving a change of circumstances affecting the welfare of the minor children and denied his motions to modify. He appeals, presenting seven questions,[1] which we have condensed and rephrased as one:

[1] The questions as posed by Father are:

1. Did the court take the best interest of the children into consideration when determining that there was not a material change in circumstance? Did the court err when it did not interpret mother's blocking of communication between children and father and denial of visitation as parental alienation . . . , and therefore, a material change in circumstances?

2. Did the court require an excessive burden of proof of parental alienation . . .? Clearly the evidence suggests . . . that the children wish to communicate with their father and that such communication is being denied them. The evidence also clearly suggests that psychological counselors are being used to discuss these issues with the children whether or not they wish to visit with their father. In civil litigation, a preponderance of the evidence is commonly found to be sufficient. This has clearly been achieved. In the words of the "Duck Test", "If it looks like a duck, and it waddles like a duck, and it quacks like a duck . . . it's a duck."

3. Was there ex-parte communication between the judge and opposing counsel before and during the hearing . . . , as

there is both direct and circumstantial evidence in the court transcript of such communication . . .?

4. Was the original visitation schedule, decided in the Circuit Court of Richmond, Virginia, and later upheld by the Circuit Court of Montgomery County, Maryland, **in direct violation of the "Free Exercise of Religion Clause" of the United States Constitution?** "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

5. Did the court judge in opposition to growing legal precedent, which views . . . telephone and online communication between parents and children as a form of visitation and therefore mandated by court order?

6. Did the court err by denying the admission of evidence of parental alienation by the Appellee's new husband. In accordance with the rules of evidence, the email presented was received by and authenticated by the appellant. . . . Had it been accepted this would have served as evidence of psychological abuse by a new member of the household of the children and thus, a material change in circumstance.

7. Did the court further ignore legal precedent which sees such violation of the religious convictions and education of the children as **not in the best interest of the children (Brown v. Szakal, 212 N.J. Super. 136 (1986) 514 A.2d 81)?**

(Emphasis in original.)

Father does not present argument in his brief on several of these issues. We address only those arguments raised and argued. *See* Md. Rule 8-504(a)(6) (appellate brief must contain "[a]rgument in support of the party's position on each issue"); *Beck v. Mangels*, 100 Md. App. 144, 149 (1994) (appellate court will not consider issues that have not been argued in a brief).

> Whether the circuit court erred by finding that Father failed to prove that there had been a change of circumstances affecting the welfare of the minor children since the entry of the final custody order.

We answer that question "No" and shall affirm the order of the circuit court.

FACTS AND PROCEEDINGS

The parties are the parents of three daughters: N, age 14, and twins, K and E, age 11. Mother currently lives and works in Silver Spring, Maryland. Father lives and works in Baldwin, New York.

In early 2019, when Mother was living in Richmond, Virginia, and Father was splitting his time between Richmond and New York, the Circuit Court of the City of Richmond held a two-day custody hearing and awarded Mother sole legal and primary physical custody of the children ("the Custody Order"). The Custody Order, entered on May 10, 2019, granted Father access to the children every weekend he was in Virginia during the school year, from 5:30 p.m. on Friday until 5 p.m. on Sunday, with 24-hour notice to Mother of his intent to exercise his right to weekend visitation. Father's weekend access was subject to a provision stating that the children "shall attend all previously scheduled activities (e.g., parties, doctor's visits, counseling, tutoring, extra-curriculars) on Father's time, unless a change is mutually agreeable to the parties." Father was granted access to the children for their entire Winter break; every Memorial Day weekend; for the first three weeks of their Summer break; and from the second Friday in August until the end of their Summer break.

In July 2019, Mother relocated to Silver Spring, Maryland with the children. In December 2019, Mother filed in the Circuit Court for Montgomery County a complaint for child support and a request to register the foreign Custody Order pursuant to Md. Code Ann., Fam. Law § 9.5-305. The Custody Order was registered in Maryland in July 2020.

Meanwhile, on January 8, 2020, Father filed in the circuit court his motion to modify custody and visitation. He alleged that the Custody Order no longer was in the best interests of the children due to numerous changes in circumstances, including Mother's relocation; that Mother was "severely" limiting Father's communication with the children; that Mother made disparaging remarks about Father to the children; that Mother and her husband were alienating the children from Father; and that the current access schedule was unworkable because of Father's employment in New York as a Rabbi. He requested that the court modify the Custody Order to award him sole legal and primary physical custody of the children or, in the alternative, to grant him and Mother shared legal and physical custody.

On November 9, 2020, the circuit court held a hearing at which Father testified and introduced 13 exhibits.[2] Much of the evidence focused upon Father's telephone access with the children. Father introduced copies of text message exchanges between Father and Mother and/or between Father and one of the children that he asserted

[2] Mother was represented by counsel at the hearing and Father represented himself. Father also represents himself in this appeal.

demonstrated that Mother was unreasonably restricting his communication. He also introduced into evidence an email from Mother to him dated September 10, 2019 in which she proposed a telephone access schedule on Fridays at 5 p.m. and Sundays at 7 p.m.[3] She explained that the girls had a fairly regimented schedule during the school week and that Father's practice of calling the girls whenever he wished was disruptive to their schedule and was causing them emotional upset because they felt guilty not taking his calls. Father testified that this email showed that Mother was limiting his communication with the children. He further testified that Mother did not always comply with this proposed schedule, giving one example of an attempt to reach K and E on Mother's phone on a Sunday evening in May 2020 at 7:46 p.m. that was declined because the children were eating dinner and then because they had decided to get ready for school the next day.

Father also presented evidence of alleged parental alienation. He introduced a text message exchange from Monday, August 31, 2020 beginning at 6:47 p.m. K texted Father from a phone she shared with her twin sister E to arrange a Zoom meeting to work on her homework with Father, but then said she needed to go to dinner. Father replied that she could call him after dinner. After dinner, K texted Father that she was done. The text that followed was from K and E's phone, but Father testified that it came from

[3] The times Mother proposed were during Father's weekend access under the Custody Order. We note, however, that Father testified that he only had visited with the children on Sundays.

Mother. It began, "Encouraging our child to violate the house rules on a school night . . . ." The remainder of the message was cut off.[4]

Other text messages introduced by Father show him accusing Mother of engaging in parental alienation because she confiscated a phone he provided to K and E and because she informed Father that the girls were unable or uninterested in speaking to him on certain occasions.

With respect to visitation access, Father testified about and introduced an email exchange concerning one instance in October 2020 when he notified Mother on a Monday that he intended to exercise his weekend visitation the following Sunday. He stated that he would pick the children up at noon in Silver Spring at a pizzeria and return them to that location at 5 p.m. Mother responded the next night that E would be happy to visit with Father that day, but that N and K both had previously scheduled activities and could not see him. She offered to reschedule the visit for another time that was convenient. Father replied that if Mother did not drop off all three children to him, she would be "in direct violation" of the Custody Order. Mother's attorney then responded on her behalf, advising that the children's prearranged activities superseded Father's weekend access under the terms of the Custody Order.

On another occasion in February 2020, Mother communicated to Father that N would be unavailable for a Sunday visit with Father because she was attending a birthday

[4] Father includes the continuation of this text message in the record extract, but he did not introduce it in evidence at the hearing despite the court asking if there was a "next page." We decline to consider evidence that was not before the trial court.

party. She added that E would visit with Father and that K had not yet decided whether to attend the visit or a previously scheduled playdate. In Father's view, this text exchange demonstrated that Mother scheduled events for the children on the weekends to evade Father's access under the Custody Order.

On cross-examination, Father acknowledged that he had accepted his current job as Rabbi for a congregation in Baldwin, New York in 2018, prior to the Virginia custody hearing and the entry of the Custody Order. Since the entry of that order, Father had not visited with the girls for a full weekend as provided in the Custody Order, but instead, had visited with them only on occasional Sundays. The children had spent Winter break with him in 2019 and had spent time with him in the Summer of 2020, though he claimed for only half of the time specified in the order.

Father testified on re-direct examination that he could not pick the children up at 5:30 p.m. on Friday or during the day on Saturday because he was observing the Sabbath. He explained that he was forbidden from traveling, driving, or operating any technology during the Sabbath.

At the close of Father's case, Mother's attorney moved for judgment, arguing that Father failed to meet his burden to "demonstrate that there ha[d] been a material change in circumstances" since the entry of the Custody Order. He emphasized that Father could have appealed the Custody Order to challenge the access schedule based upon his work commitments and his religious observance but did not do so. Mother's attorney further argued that did not amount to a change of circumstances. With respect to parental

alienation, Mother's attorney argued that evidence presented by Father reflected that Mother tried to accommodate Father's schedule and the busy social calendars of their 11-year-old twins and 14-year-old daughter, who were "immersed in their community." Much of the evidence and testimony pertained to telephone access, which Mother's attorney noted was not required by the Custody Order. Of great significance, Father had presented no evidence bearing upon "the girls' wellbeing or how they're doing now or how their lives have been impacted or changed since the entry of the order."

Father responded that he had presented evidence of numerous material changes, including Mother's recent remarriage, her relocation with the children, the children's transfer to a new school, his and Mother's new jobs, and changes in their finances. He maintained that he had presented evidence of parental alienation and the denial of visitation which was impacting the children's psychological welfare. He argued that it was psychological abuse to prevent the children from communicating with him by text message.

The court granted Mother's motion, ruling that Father had not met his threshold burden of proof to show a change of circumstances affecting the welfare of the minor children. The court noted that the Custody Order referenced Father's employment in New York and, consequently, his stated difficulty in traveling to Maryland to see the children for weekend visitation was not a change in circumstances since the entry of the

order.[5] The Custody Order did not require Mother to provide telephone access between Father and the children, but the court reasoned that the parties could nevertheless mutually agree to a telephone access schedule. Father had introduced into evidence the email from Mother proposing twice weekly telephone calls -- on Friday evenings and Sunday evenings -- but asking him to cease calling the children at other times because it was disruptive to their schedule. The court found that Mother had given Father the "opportunity" for routine telephone access, but he was apparently unsatisfied with her proposal.

With respect to Father's burden of proof, the court opined:

> [A]ll I have heard from you since 10:00 a.m. this morning is me, me, me and I, I, I. I have not heard one single thing about these three little girls. I haven't seen a picture. I haven't heard about how they're doing in school. I haven't heard whether or not they have a dog or a cat or a fish tank. I don't know anything about them. It's all about you, sir. Me, me, me. I, I, I. This isn't convenient for me. This interrupts my schedule.
>
> I would like it changed. I want to see my kids more regularly. Me, Me, Me. I, I, I. You have the burden of proof, Mr. Shaffin, and you have the burden of proving [t]hat this order that is currently in place, this custody order, this visitation order has somehow been – there has been a material change in the lives of these children which makes this order no longer in your [sic] best interest and so you have asserted this morning that Ms. Schechter has moved to Maryland. You said to me, that has to be a material change, Judge. You said there has been a remarriage of Ms. Schechter. That alone is a material change, Judge.

[5] Mother's relocation from Richmond, Virginia to Silver Spring, Maryland in the interim would have decreased Father's travel time.

Both of us have new jobs since the issuance of the order on [sic] May of 2019. That alone Judge is [a] material change in circumstances. Both of us have new finances. Judge, that's a material change. You have to find that. You said there is a child support order in place. That's a material change – materially changed everything, Judge. You have to find there is a material change in circumstances, Judge. You also have alleged there has been parental alienation. It's obvious, Judge. I'll address the alienation and psychological abuse. There is absolutely not a shred of evidence before this Court that Ms. Schechter has engaged in parental alienation, that she has psychologically intimidated or abused these children.

That is absolutely a fallacy. There is not a shred of evidence before this Court that she has done that. So this record should be very very clear on that issue alone. Moreover, the single movement of residences with parties moving from one place to another. Parties remarry all the time. Parties get new jobs. They get new finances. They have new financial obligations. None of that has been shown to this court to be a material change in circumstances which affects the welfare of these children. Simply because something has changed does not mean that the welfare of the children has necessarily changed and Mr. Shaffin you bear that burden.

You must show that there has been a material change in circumstances that is likely to affect the children's welfare. That is your burden to prove that and the case law in this state is clear on that. Simply because there has been a change in circumstances doesn't mean that these little girls have been – their welfare, their wellbeing both psychologically, emotionally and physically has been impacted and you, sir, bear that burden.

You have presented not a shred of evidence to show me that these girls have been materially impacted, that their welfare has been impacted by these changes and you bear that burden. So, accordingly, I cannot move on to the next step, which is consider a change in the schedule as has been suggested by Mr. Shaffin and I will not do it. It would be an error of this Court to do so.

On December 4, 2020, the court entered an order denying the motion to modify custody and visitation. Father noted this timely appeal. [6]

We shall supplement these facts as necessary to our discussion of the issues.

STANDARD OF REVIEW

We review child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals has described these standards as follows:

> We point out three distinct aspects of review in child custody disputes. 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.

Id. at 586 (cleaned up). We give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id*. at 584 (citation omitted).

[6] The December 4, 2020 Order also denied Father's petition for contempt. We are without jurisdiction to consider any argument that Mother should have been found in civil contempt. *See Pack Shack, Inc. v. Howard Cnty.*, 371 Md. 243, 245-46 (2002) ("a party that files a petition for constructive civil contempt does not have a right to appeal the trial court's denial of that petition").

DISCUSSION

A trial court must engage in a two-step process when presented with a request to change custody or visitation:

> First, the circuit court must assess whether there has been a "material" change in circumstance. *See Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody. *See id*.; *Braun v. Headley*, 131 Md. App. 588, 610 (2000).

McMahon v. Piazze, 162 Md. App. 588, 594 (2005). If a material change of circumstances is not found, "the court's inquiry must cease." *Braun*, 131 Md. App. at 610. A change is material if it affects the welfare of the child. *McMahon*, 162 Md. App. at 594; *see also Wagner*, 109 Md. App. at 28 ("In [the custody modification] context, the term 'material' relates to a change that may affect the welfare of a child."). Evidence bearing upon materiality necessarily relates to the best interests of the children. *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012).

In this case, Father, as the moving party, bore the burden "to show that there ha[d] been a material change in circumstances since the entry of the [Custody Order in May 2019] and that it [was] now in the best interest of the child[ren] for custody [or visitation] to be changed." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008), *aff'd* 408 Md. 167 (2009). The trial court did not clearly err by finding that Father had not adduced any evidence about the welfare of the children and, thus, had failed to meet his burden.

Father did not testify about or introduce any evidence about the children's school performance, their psychological wellbeing, their interests and hobbies, their religious observance, or their social lives. His evidence showed that on some occasions when he tried to communicate with the children by text or by telephone, largely on school nights, Mother declined to allow communication or informed him that the children were unavailable or uninterested in communicating. As the children's sole legal and primary physical custodian, however, Mother was authorized to make those decisions on behalf of the children. *See Gillespie*, 206 Md. App. at 152 n.1 (physical custody includes the right "to make the day-to-day decisions required during the time the child is actually with the parent" and legal custody includes the right to make "long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare" (quoting *Taylor v. Taylor*, 306 Md. 290, 296 (1986))). Likewise, Mother's communications with Father concerning weekend access were cordial and in keeping with the express terms of the Custody Order, which granted Father access subject to the girls' preexisting plans. Absent evidence that adhering to the terms of the Custody Order was detrimental to the children, Mother's enforcement of its terms does not amount to a material change.[7]

[7] For the same reason, Father's argument that the visitation schedule set out in the Custody Order violates the Free Exercise Clause of the Constitution because it forces him to violate the Jewish Sabbath to see his children is not properly before us. This is an argument that could have been raised in a direct appeal from the Custody Order, but it is not a change of circumstance since the entry of that order.

Father also contends that the trial court erred in its conduct of the hearing. He asserts that the trial judge engaged in improper *ex parte* communications with Mother's counsel. There is no basis in the record for this assertion and we decline to address it further. Father also contends that the court erred by permitting N to be called as a witness. As discussed, however, only Father testified at the modification hearing. Mother's lawyer identified N as a witness he might call in her case, but because the court granted Mother's motion for judgment at the close of Father's case, Mother never testified or called any witnesses. On that basis alone, this contention is without merit.

Accordingly, the circuit court did not err in determining that Father failed to prove that there had been a change of circumstances affecting the welfare of the minor children since the entry of the final Custody Order. We, therefore, affirm the Order of the circuit court.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.