

Circuit Court for Montgomery County
Case No. 132088FL

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1252

September Term, 2020

CHRISTOPHER CODY

v.

AUBREY CODY

Berger,
Shaw Geter,
Wells,

JJ.

Opinion by Shaw Geter, J.

Filed: September 3, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from an order by the Circuit Court for Montgomery County, granting, in part, a motion to modify a custody and parenting order and denying a motion to modify legal custody. Appellant timely appealed and presents the following questions:

1. Did the trial court abuse its discretion in setting a schedule of access between the Father and minor children which requires the Father's out-of-state or out-of-country travel for each and every period of access without considering the children's best interest, the children's relationships with extended family in Oregon, and the Father's financial inability to effectuate the required travel?
2. Did the trial court err or abuse its discretion when the trial court modified the residential schedule to substantially reduce Father's access with the minor children?
3. Did the trial court err and abuse its discretion in failing to take new testimony and evidence?

For reasons discussed herein, we hold the trial court did not err or abuse its discretion in granting the motion for modification.

BACKGROUND

Appellant, Christopher Cody, and appellee, Aubrey Cody, are the parents of three minor children. Appellant resides in Oregon, and the children have lived with appellee, first, in Bali, Indonesia since 2013 and now in Australia.¹ On October 25, 2016, the parties executed a Custody and Parenting Agreement (“Agreement”) wherein they agreed that appellee would have primary physical custody of the children. The Agreement states that appellee “will have sole legal custody of the minor children. However, she will communicate with [appellant] regarding major decisions effecting the children's health,

¹ Appellee and the Children are domiciled in Maryland.

education, religion, and welfare prior to making such decisions; share with him all relevant information related to these decisions; and attempt to arrive at a mutually agreeable decision between the parties.” Appellant is to have “access with the minor children in the United States for three (3) weeks, during summer break. The agreement also provides, “[o]ther than during the summer, if [appellee] travels to the United States with the children, [appellant] may have reasonable access to the children where [appellee] is located with the children at the time. The parents agreed that they would “equally divide the children’s Winter Break each year . . . [and appellant] will be solely responsible for any necessary travel cost for the children . . . [.]” Additionally, “[w]hile the children are in his care, [appellant] will refrain from using or consuming alcohol, marijuana, or illicit drugs. He will also agree not to leave the children home alone until legal under state law.” The parents agreed that appellee is to “pay the cost of the minor children traveling to and from the United States for summer vacation each year[,]” however, “all other costs required for [appellant’s] access to the children (whether within the United States or internationally) [is] the sole responsibility of [appellant].” A Judgment of Absolute Divorce was granted on November 4, 2016, which incorporated, but did not merge the agreement.²

On March 21, 2019, appellee filed a motion to modify, seeking to limit appellant’s access to the minor children and requesting that all such access be supervised by an agreed upon supervisor. The motion alleged that while in appellant’s care, the children suffered

² When a trial court incorporates a custody agreement into the Judgment of Absolute Divorce, “it becomes enforceable through the courts, as a court order.” *Green v. Green*, 188 Md. App. 661, 679 (2009).

injuries and appellant “failed and refused to properly care for the children’s basic needs, including basic hygiene and medical care and/or has refused to comply with the parties’ Custody and Parenting Agreement.” On June 17, 2019, appellant filed a motion to modify legal custody asserting, that appellant “unilaterally incurs expenses the cost of which are substantially born by the [appellee],” that appellee “fails to communicate with the [appellant] regarding major decisions impacting the minor children,” and that [appellee] “substantially interferes with plaintiff’s access with the children.”³

In December 2019, a hearing was held and in his oral ruling, the judge stated:

So, I’m going to grant mom’s request to have supervised visits. On a temporary order. I don’t want to do this final order and have you back here for four more days in front of some other judge. . . . Because I don’t want a lifetime of dad having supervised. I don’t think that [sic] appropriate, I don’t think he’s that bad of a dad in any way whatsoever. I think he’s just got to be more careful. I got to be concerned with my decision, what the best interest of these children and this has been a bad, bad couple of years, and it needs to be a calming down, if nothing else.

On January 3, 2020, the court issued an Order, granting appellee’s motion to modify custody and the court denied appellant’s motion for modification of legal custody. The

January order stated:

ORDERED, that Plaintiff Christopher Cody shall have temporary supervised visitation with the minor children Phineas (DOB: 1/9/2007), Wyatt (DOB: 7/16/2008), and Sabine (DOB: 3/25/2010); and it is further

ORDERED, that the Plaintiff’s supervised visitation with the minor children on December 20, 2019 and December 21, 2019 shall be supervised by Supervised Visitation and Investigations, LLC; and it is further

³ The court’s denial of this motion was not raised on appeal for the *In Banc* review and thus the court’s ruling remains in full force and effect.

ORDERED, that Plaintiffs supervised visitation with the minor children during the Summer Break of 2020 shall take place in Oregon and shall include overnights supervised by an agreed-upon independent third-party supervisor. If not agreed upon, the [c]ourt shall determine who shall supervise based upon the parties' recommendations; and it is further

ORDERED, that Plaintiff's supervised visitation with the minor children during the Winter Break of 2021 shall take place in Bali, Indonesia and shall consist of full-day visits supervised by an agreed-upon independent third-party supervisor. If not agreed upon, the [c]ourt shall determine who shall supervise based upon the parties' recommendations; and it is further

ORDERED, that the costs of supervision shall be split equally between Plaintiff and Defendant; and it is further

ORDERED, that a status hearing shall be held before this [c]ourt on January 22, 2021, at which the parties may appear remotely; and it is further

ORDERED, that counsel shall provide this [c]ourt with status updates prior to that status hearing; and it is further

ORDERED, that each party's requests for attorney's fees and costs are DENIED; and it is further

ORDERED, that all other conditions and terms of the parties Marital Settlement Agreement and Custody and Parenting Agreement shall remain in effect until further order of this [c]ourt.

Appellant then requested an *In Banc* review and following a hearing, the three-judge panel vacated the trial court's temporary order and remanded the case for entry of a final order. The panel also instructed the court to "clarify its finding with respect to its ruling requiring supervised visitation for [appellant], and with regard to the length and times of supervised visitation, while also considering the practicality and financial burden imposed on the parties by ordering overnight, 24-7 supervised visitation."

On August 3, 2020, appellant filed a motion to take new testimony and evidence. Appellant argued that "material changes in circumstances have arisen" which would

“warrant the trial court’s consideration before ruling anew on the parties’ requests for modification of custody.” Specifically, appellant argued that the children had relocated from Bali, Indonesia to Australia; had enrolled in an Anglican, co-educational grammar school in Australia; and did not travel to the United States during their summer break for access with appellant, despite the custody agreement and court order. Appellant further stated that he underwent an alcohol evaluation, and no treatment was recommended; and that he had completed an anger management course. Because of these changes, appellant argued the trial court should have taken new testimony and evidence prior to ruling.

Appellee, filed an opposition to appellant’s motion, arguing among other things, the trial court did not have jurisdiction to take additional evidence because the remand only directed the trial court to “clarify its findings.” On September 14, 2020, the trial court denied the motion to take new testimony and evidence, stating that it was required to “make a final determination pursuant to *Frase v. Barnhart*, 379 Md. 100 (2003).”

On September 29, 2020, the trial court issued an oral ruling making the temporary order final and clarified “its findings with respect to its ruling for supervised visits” The judge noted his “concerns with [appellant’s] fitness[,]” and that appellant was “rather reckless and cavalier” when the children were in his care. The judge detailed several incidents where appellant failed to properly care for the children; some resulting in injuries. Ultimately, the court did not order the 24-7 supervised visits, reasoning that ordering such would be too burdensome on the parties financially.

On December 11, 2020, the court’s clarifying order was entered:

ORDERED, that [appellant] Christopher Cody shall have access with the minor children Phineas (DOB: 01/09/2007), Wyatt (DOB: 07/16/2008), and Sabine (DOB: 3/25/2010) as more fully set forth below:

- The [appellant] shall have access with the minor children for six (6) days for (6) hours each day from December 19th through the 24th in the Washington D.C. metropolitan area with the access times to be worked out by the parties; and
- The [appellant] shall have access with the minor children during the last week of winter break, wherever the children are residing, for a period of four (4) days—eight hours each day. The children shall be returned to the [appellee’s] care not less than two (2) days before school starts; and
- That [appellant] shall have access with the minor child for six (6) days commencing on June 12 for eight (8) hours each day in the Washington D.C. metropolitan area with the access time to be worked out by the parties;

The court’s order also stated:

[T]hat the [c]ourt is aware that school schedules, work schedules, passport and travel issues and restrictions, tax law and other matters may preclude this order being followed precisely on the days listed. The parties are strongly encouraged to work out between themselves compromises and substitutions that will be within the spirit of the order. It is this [c]ourt’s sincere hope that the parties will start to resolve issues amicably for the best interest of their children.

STANDARD OF REVIEW

A “court’s primary objective, when deciding disputes over child access, ‘is to serve the best interests of the child.’” *Gizzo v. Gerstman*, 245 Md. App. 168, 199 (2020) (citing *Conover v. Conover*, 450 Md. 51, 54 (2016)). The “appellate court does not make its own determination as to a child’s best interest; 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.” *Gizzo*, 245 Md. App. at 200 (quoting *Gordon v. Gordon*, 174 Md. App. 583, 637–38 (2007)). “[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. *Gizzo*, 245 Md. App. at 200 (quotations and citations omitted). We have stated:

An abuse of discretion may occur when 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, or when the ruling is clearly against the logic and effect of facts and inferences before the court.

Id. “In our review, we give ‘due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses.’” *Gillespie*, 206 Md. App at 171.

DISCUSSION

1. The Court did not abuse its discretion in modifying the prior Order.

Child access (custody and visitation) orders are ordinarily of two types. There is first a “*pendente lite* determination, designed to provide some immediate stability pending a fully evidentiary hearing.” *Frase v. Barnhart*, 379 Md. 100, 111 (2003). Second, “the issue comes before the court for ‘final’ resolution, either through agreements of the parties or on evidence presented at a trial conducted by the court.” *Frase*, 379 Md. at 111. “Because the court retains continuing jurisdiction over the custody of minor children, no award of custody or visitation, even when incorporated into a judgment, is entirely beyond modification, and such award never achieves quite the degree of finality that accompanies other kinds of judgments.” *Id.* at 112 (citing *McCready v. McCready*, 323 Md. 476, 481 (1991)). “[C]ustody decrees are never final in Maryland, and any reconsideration of a decree should emphasize changes in circumstances which have occurred subsequent to the last court hearing.” *Frase*, 379 Md. at 112. Courts engage in a two-step process:

First, the circuit court must assess whether there has been a “material” change in circumstance. 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.

Gillespie, 206 Md. App. 146, 170 (2012) (citations omitted). On review, “[t]herefore, we first consider whether the trial court erred in finding that a material change in circumstances occurred. Second, we consider whether the court abused its discretion in modifying custody.” *Id.* We have stated, “[a] material change of circumstances is a change in circumstances that affects the welfare of the child.” *Id.* (citing *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)).

Here, the parties do not contest that a change of circumstances occurred. The judge agreed, stating in his oral ruling on December 19, 2019:

And I do find there’s a material change, again, not just because the parties agree but because of the animosity and increased inability to decide things, because I find there is material change because dad’s been denied access or free-range access as the agreement indicates. Mom required supervised, again, not by court order, but that’s a reason right there. Why there’s a change, because of the accumulation of injuries to the children or incidences that upon the return of them.

Appellant, however, argues the court abused its discretion in not acting in the best interest of the children because the December 11, 2020 final order “provides for no access between the minor children and [appellant] at or near his Oregon residence” which, appellant argues, “substantially impairs” the children’s relationship with appellant and appellant’s relatives who reside in Oregon. Appellant contends the modified schedule significantly reduces his access with the minor children.

We note that during the evidentiary hearing in this matter, testimony was presented regarding several incidents when the children were in the care of appellant and injuries

occurred. The court noted its “biggest concern” was the daughter’s injury and following infection, and that appellant “shut down for five days no contact between mom and his daughter.” The court also noted an incident where the children were returned to appellee’s care with untreated head lice, and another when a child went without underwear for 12 days and was returned to appellee with “caked on feces.” The court stated this was “beyond inappropriate.”

In our review of the record, we observed that the court carefully considered how these events impacted the welfare of the children and could do so in the future. In its September 29, 2020 oral ruling, the judge expressed his concerns about [appellant’s] fitness and his “reckless and cavalier” nature, stating, “I’m concerned about the safety of the children when they are with dad.” The judge stated that he based his decision on “the totality of the evidence presented” during the four-day trial. As previously noted, an appellate court’s task is to give “due regard to the trial court’s opportunity to assess the credibility of the witnesses.” *Gillespie*, 206 Md. App at 171. Here, while Appellant’s access and visitation was reduced, the trial judge’s findings were fully supported by the record, his focus was clearly on the best interests and safety of the children, and his decision to limit visitation, therefore, was not an abuse of discretion.

2. The court was not required to take new testimony and evidence.

Appellant next argues the trial court erred and abused its discretion by declining to take new testimony and evidence upon remand. Appellant asserts that, between the December 16, 2019 trial and the September 29, 2020 oral ruling, “substantial changes in circumstances occurred.” Appellant contends the trial judge’s statement on remand that he

was, “not allowed to take new testimony[,]” was an “incorrect legal premise[,]” and that, “the remand order provided no limitation on the trial court’s ability to consider new testimony and evidence.” Appellee argues that, the court did not err in denying the appellant’s motion to take new testimony and evidence because doing so would have been outside the “scope of the remand.”

The remand order issued by the *In Banc* panel was specific and limited. It required the trial court to enter a “final Order” to “clarify its findings” with respect to its ruling about supervised visitation and to consider the “practicality and financial burden imposed on the parties by ordering overnight, 24-7 supervised visitation.” As such, the order compelled the trial court to examine the testimony and argument from the prior evidentiary hearing. In response, the judge explained that, in considering the parties’ financial situations and practicality of the 24-7 supervised visitation, a final order, incorporating those limits would be too burdensome on the parties. The judge then provided clarity regarding his prior order.

We note that while it is within the discretion of a lower court, upon remand to “conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court,” Md. Rule 8-604(d)(1), that court is not required to do so. Here, we hold the court did not abuse its discretion in limiting its ruling to the prior testimony and evidence in the case and declining the request to present additional testimony and evidence as testimony regarding the new circumstances would not have been in accordance with the order of the *In Banc* panel.

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