Circuit Court for Prince George's County
Case No. CAD15-02990

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1309

September Term, 2021

J.B.

v.

L.B.

Arthur,
Tang,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 6, 2022

In 2016, the parties to this case agreed to the entry of a consent order, under which they shared joint legal custody of their child, and the mother received primary physical custody of the child.

Five years later, the father moved for a modification of custody. At an evidentiary hearing, the Circuit Court for Prince George's County determined that the father failed to meet his burden of showing a material change in circumstances that might warrant a modification of custody.

The father has appealed, contending that the court improperly restricted his testimony and that the court erred in finding that no material change in circumstances had occurred. The father also contends that the court abused its discretion by making revisions to the access schedule for winter break and spring break from the child's school. For the reasons discussed in this opinion, we reject each of these challenges and affirm the order denying the father's request for modification of custody.

FACTUAL AND PROCEDURAL BACKGROUND

A. Custody Arrangement Under 2016 Consent Order

J.B. ("Father") and L.B. ("Mother") married each other in June 2011. They are the parents of one child, O., born in March 2014. At the time of the child's birth, the two parents lived together in Laurel. They separated in December 2014, when Mother moved to Columbia. Mother filed a complaint for divorce in the Circuit Court for Prince George's County. Father counterclaimed for divorce. Each parent requested sole legal custody and primary physical custody of the child.

In January 2016, the two parties reached "an agreement resolving all issues arising from their marriage to one another[.]" Both parties signed a consent order setting forth the terms of their agreement.[1] The circuit court approved the consent order and entered it on February 4, 2016. A few weeks later, the court entered a judgment of absolute divorce, which ratified the consent order and stated that the court would retain jurisdiction as necessary to effectuate the terms of the consent order.

Under the consent order, the parties shared joint legal custody of their child, "with [Mother] having the final decision-making authority in the event of an impasse." The consent order stated that, "[i]n the event of an impasse, and prior to [Mother] exercising her final decision-making authority," the parties agreed to participate in a mediation session if requested by either party. The parties agreed that Mother would continue to provide health insurance for the child. The parties agreed "to discuss the minor child's participation in extracurricular activities, including . . . sports, art, religious training or other specialized instruction" before either parent would register the child to participate in those activities. Both parties expressed their intent to continue "residing within the Washington, D.C. Metropolitan Area, for the foreseeable future, so as to facilitate" the shared physical custody schedule.

The consent order granted Mother primary physical custody and established a

[1] Generally, a consent order is "'an agreement of the parties with respect to the resolution of the issues in the case or in settlement of the case, that has been embodied in a court order and entered by the court, thus evidencing its acceptance by the court.'" *Barnes v. Barnes*, 181 Md. App. 390, 408 (2008) (quoting *Long v. State*, 371 Md. 72, 82 (2002)).

schedule for Father's access with the child. The child would spend every Monday overnight with Father and every other weekend with Father. Father would pick up the child from school or other daytime activity in the afternoons and transport the child to school or daytime activity in the mornings. On weeks when the child would not be staying with Father for the upcoming weekend, Father had the option to pick up the child on Wednesday afternoons and return the child to Mother's home the same evening. During the summer, each parent was entitled to have the child for two non-consecutive weeks of vacation. Generally, the parties agreed to "follow the Howard County Public School calendar to determine holidays and days off from school, unless the schedule at the minor child's school/daytime activity is different."

The consent order set forth a "holiday access schedule" which "supersedes the regular access schedule" where applicable. Under the holiday access schedule, the child would spend Martin Luther King Jr. Day weekend, Independence Day weekend, Labor Day weekend, and the Thanksgiving holiday and weekend with Father. The child would spend President's Day weekend, Memorial Day weekend, and Columbus Day weekend with Mother. The parties agreed that each parent would provide the other parent with reasonable access to the child on the child's birthday; that Mother would provide reasonable access to the child on Father's Day and Father's birthday; and that Father would provide reasonable access to the child on Mother's Day and Mother's birthday.

The holiday access schedule further stated that the child would be with Mother for Christmas every year, from the morning of December 24th through the afternoon of

December 28th. The parties would have the child on alternating years for New Year's Eve, from the afternoon of December 31st through the evening of January 2nd.

The access schedule included a paragraph titled "Winter Break/Spring Break." It stated: "No schedule is being set at this time. The parties will revisit the issue of winter break and spring break with the intention of equally sharing the minor child's time during those breaks once the minor child is enrolled in school."

The access schedule ended with a paragraph titled "Special Events." It stated: "Each party shall cooperate and consent to make the minor child available for special events at the request of the other party, said consent not to be unreasonably withheld, upon 30 days['] notice and with make-up visitation to be provided on the next available weekend, or weekday, whichever may be appropriate."

B. Requests for Custody Modification

In early 2019, when the child was five years old, Mother informed Father that she was moving to Greenbelt. Mother enrolled the child for kindergarten at Friends Community School, a private school affiliated with the Quaker religion.

At that time, Father moved to modify the access schedule, asking to extend his weekly Monday overnight access to include Tuesday overnight access. Mother opposed that request and moved to modify the access schedule by eliminating Father's Monday overnight access during the school year. In November 2019, after a hearing before a family magistrate, the circuit court denied the competing motions to change the access schedule.

In January 2020, Father, representing himself, filed two motions with the title "Motion to Modify Consent Order." In the first motion, Father asked for an order requiring the parents to communicate with each other through a particular website and mobile app. In the second motion, Father asked for an order allowing the parents to designate a cohabitant to drop off or pick up the child for daytime activities. Mother opposed both motions, asserting that they failed to allege any facts that might warrant relief.

Also in January 2020, Mother moved for modification of legal custody. Mother alleged that the parties were no longer able to communicate effectively with one another to reach shared decisions regarding the child's welfare. Mother asked that she be awarded sole legal custody of the child.

In May 2020, Mother filed a motion for contempt. Mother asserted that Friends Community School had implemented a remote learning format in response to the COVID-19 pandemic. Mother asserted that, in the exercise of her tie-breaking authority, she had decided that all remote learning should take place at her home. Mother alleged that Father had refused to transport the child to Mother's home on Tuesday mornings after his Monday overnight visits. Father, through counsel, opposed the motion for contempt. Father asserted that the child participates in remote learning from Father's home and argued that the consent order did not require him to transport the child to Mother's home for school.

Separately, Father, through counsel, filed a motion titled "Amended Motion to

Modify Legal Custody." In that motion, Father alleged that Mother had made various parenting decisions that were contrary to the child's best interests. Father asked the court to grant him sole legal custody of the child.

Shortly before the scheduled hearing on Mother's pending motions, the circuit court issued an order denying or dismissing Father's "Motion for Modification." The order stated that Father's "motion, on its face, fail[ed] to state a material change in circumstances entitling [Father] to relief." The order did not specify which of Father's various motions had been denied.

On November 9, 2020, a family magistrate held a hearing on Mother's motion to modify legal custody and motion for contempt. The two parents testified about, among other things, their disagreements over the location of the child's remote learning. The magistrate recommended that the court issue an order requiring all remote learning to take place at Mother's home and requiring Father to transport the child to Mother's home on each day of remote learning for the child's school. The magistrate recommended that the court deny Mother's request for sole legal custody and dismiss her motion for contempt, without prejudice.

Father filed exceptions to the magistrate's recommendations. Separately, Father requested a hearing on his "Amended Motion to Modify Legal Custody." The circuit court issued an order dismissing Father's exceptions and denying his request for a hearing. The order stated that the hearing request was "moot" because the court had "previously dismissed" his amended motion for modification of custody. Father made a

timely motion to alter or amend that order. He argued that the previous order, which had denied Father's "Motion for Modification," concerned the two motions that he had filed on his own behalf in January 2019, but did not address the "Amended Motion to Modify Legal Custody" that his counsel had filed several months later. The court granted Father's motion to alter or amend and scheduled a hearing on his exceptions and his amended motion to modify legal custody.

Father subsequently submitted another motion titled "Amended Motion for Modification of Custody, Access and Other Relief." As in his previous motion, Father alleged that Mother had made various decisions that, according to Father, were contrary to the child's best interests.[2] Father asked the court to maintain joint legal custody, but to grant Father "tie-breaking authority on medical decisions." Father requested primary physical custody of the child or "50/50" shared physical custody, along with a revised schedule for holidays.

C. Evidence Presented in Support of Motion to Modify Custody

On September 27, 2021, the circuit court held a hearing on Father's amended motion for modification of custody. The parties and witnesses participated through Zoom. Father testified on his own behalf and introduced testimony from three other

[2] Among other things, Father alleged that Mother had "forc[ed] the minor child to dress in traditional 'girls' clothing" and "forced [the child] to use gender-neutral pronouns," even though the child "identifies as a boy[.]" Father also alleged that Mother "refused" to allow Father to have access on "important Jewish religious and cultural events and holidays" and on "other significant family events." Father had made similar allegations in the previous version of the motion.

witnesses: one family friend, Father's wife, and the child's paternal grandfather.[3]

At the time of the hearing, O. was seven years old and was attending second grade at Friends Community School. In his testimony, Father explained that he lives with his wife in Washington, D.C. Father said that it takes about 30 minutes to drive from his home to O.'s school, which is a short distance from Mother's home. Within the previous two years, Father had started a new job as a "remote medical coder," a job that allowed him to work exclusively from home and to "set [his] own schedule."

Father testified that, on two occasions, Mother failed to return O. to Father's care when Father arrived to pick up O. for scheduled access. In the first instance, during December 2020, Father arrived at Mother's home at the normally scheduled time for the end of the school day. Mother told Father to return two hours later because O. was participating in a remote extra-curricular activity. A snowstorm prevented Father from returning later in the day. In the second instance, during March 2021, Mother told Father upon his arrival that O. "was still getting ready and that [Father] should come back" about 30 or 45 minutes later. According to Father, Mother's boyfriend "lock[ed] the front door to prevent [O.] from leaving," but O. managed to "sneak around the back" to get to Father's car. In both instances, Father called the police to report Mother, but the police declined to intervene.

Some of the testimony concerned the parents' decisions regarding the child's

[3] At the hearing, Father did not pursue his exceptions to the magistrate's recommendations concerning remote learning. By that time, the child's school had ended its remote learning format and returned to in-person classes.

clothing. Father offered testimony from the parent of another child who had attended kindergarten with O. That parent testified that, "years ago," she had seen O. "wearing a skirt on one occasion" at a school event, even though she had only seen O. wearing "male gendered clothes" before that day. On the occasion when O. was wearing the skirt, Mother was present with O., but Father was not present.

Father's wife testified that, when she and Father would pick up O. from Mother's house, O. "often" would be "dressed in what would be considered stereotypically girl's clothing." Father's wife said that O. would change into a different outfit after arriving at their house and that she and her husband do not provide any feminine clothing for O. to wear at their house. Father's wife recalled that the occasions on which she saw O. leave Mother's house wearing feminine clothing had been "pretty frequent" in the past, but occurred "less [often] recently."

In his testimony, Father explained that O. was listed as "a boy . . . on his birth certificate." Father said that O. "identifies . . . as a male" and prefers the pronouns "he, him[.]" Father said that, about three years earlier, Mother started providing "dresses and traditional girls' clothing" for O. to wear. On repeated occasions, O. would be dressed in feminine clothing when Father picked up O. from school or from Mother's home, and O. would ask to change clothes as soon as he arrived at Father's home. Father noted that these occasions had "kind of stopped" occurring in recent months. He recalled that the "last time" he saw O. wear "non-traditional clothing" was March of 2020, about a year and half before the hearing.

Father testified that, in May 2020, representatives from O.'s school notified the two parents of a "bullying incident" involving O. and another child at school. Father said that, in response, he expressed to Mother his "concerns" about O.'s clothing. According to Father, Mother said that "it [was] no big deal" and that they should not "care[] whether or not he's being bullied." Father testified that Mother said that O. "lives in two different homes," and that "he is going to have two different rules and traditions and expectations." Father also testified that he "tried to . . . work together with [Mother] to find a psychologist" for O., so that O. would "have someone to talk to." Father said that, when he made that suggestion, Mother selected a therapist unilaterally and denied Father any opportunity to suggest anyone other than the therapist she had selected. Ultimately, Mother did not enroll O. in therapy.

Father testified that he has also expressed to Mother his concerns that, although Mother provides O. with health insurance, O. has no primary care physician for routine checkups. Father said that he had provided Mother a list of physicians near her home. Father said that Mother initially agreed to review the doctors that he suggested, but she never selected any doctor as a primary care physician for the child.

According to Father, Mother had repeatedly failed to identify Father as O.'s father on paperwork for medical treatments. On three occasions, Father encountered difficulty in gaining access to O.'s medical records at an urgent care facility or dental office. Each time, Father gained access to O.'s medical records after producing documentation to prove that he is O.'s father. Father admitted that, during the previous year, Mother "for

the most part" had been "pretty good" at making sure to include Father's contact information on paperwork related to O.'s education and health care. Nonetheless, Father asked the court to change the consent order by adding a provision requiring Mother to include Father's contact information on any registration forms for the child.

Father testified that, during the summer of 2021, Father planned to take O. for a vacation in Canada to visit members of his wife's family. Father said that, when he told Mother about the vacation several months in advance, Mother said that she would withhold the child's passport because of restrictions on non-essential travel during the pandemic. Mother eventually gave the child's passport to Father on the day on which Father left with the child for the vacation. Father said that, if he had received the passport a few weeks earlier, he would have been able to apply for a "fast pass" to make the customs process less time-consuming. Father asked the court to add a provision to the custody order stating that each parent is entitled to possess the child's passport at least two weeks before any international travel with the child.

As mentioned previously, the consent order stated that the parties "w[ould] revisit the issue" of the access schedule for winter break and spring break "with the intention of equally sharing the minor child's time during those breaks once the minor child is enrolled in school." Father indicated that the parents had never reached an agreement on how to share those breaks. Father asked the court either to divide each spring break "evenly down the middle" or to "alternate" spring breaks, so that Father would have the child for spring break in even-numbered years and Mother would have the child for

spring break in odd-numbered years. With respect to winter break, Father asked the court to "split it evenly" each year, so that Mother would have the child for "the first week of winter break" and Father would have the child for "the second week."

During his testimony, Father explained that he practices Judaism, but Mother does not. Father said that O. joins Father in Shabbat services whenever Father has O. in his care on a Friday evening. Father stated that one reason he was requesting a "week on/week off" schedule was that Father wanted O. to join those weekly services and "more fully connect with [O.'s] Jewish religion."

Father testified that, at the time Father and Mother married each other, they entered into a ketubah. Father described a ketubah as "a Jewish contract that is signed by both parties . . . in front of witnesses." Father began to explain that, at the time of their wedding, Father and Mother made certain promises about how they "intend[ed] to raise [their] children[.]" At that point, Mother's counsel objected. The court sustained the objection, ruling that an agreement that the parties had made at the time of their wedding was not relevant to the issue of whether the terms of the consent order should be modified.

As the direct examination continued, Father's counsel asked Father to explain his "interpretation" of the "special events" paragraph from the consent order. Mother's counsel objected on the ground that the consent order "speaks for itself." The court agreed, ruling that Father could not testify about his subjective interpretation of the terms of the consent order.

Father's counsel proceeded to ask Father whether the parties had had any discussions about access to the child on Yom Kippur or Rosh Hashanah during the past year. Father said that, in August of 2021, he "requested under the special events clause" that Mother consent to make O. available to spend Yom Kippur and Rosh Hashanah with Father. Father testified that Mother "said no" to his request, and, as a result, Father did not have additional access on either Yom Kippur or Rosh Hashanah in 2021. During cross-examination, Father acknowledged that Mother did not refuse his request outright; she asked for additional days with the child first before she would agree to give Father additional days.[4]

Father explained that, in the past, "there ha[d] been times" when he was able to celebrate Yom Kippur or Rosh Hashanah with the child, but only because his regular access sometimes "overlapped" with those holidays. Father requested that the court change the holiday access schedule so that O. would stay overnight with Father one day each year for Yom Kippur and two days each year for Rosh Hashanah.

Father also asked the court to grant him access on the Saturday after his thirteenth birthday, so that O. "would be able to celebrate his Bar Mitzvah with [Father]." Mother stipulated that Father could have the child on that weekend, regardless of the regular

[4] During cross-examination, Mother's counsel asked: "With Yom Kippur and Rosh Hashanah this year, isn't it true that [Mother] offered you to have both of those holidays, and you testified not if there's a quid pro quo, correct?" Father answered: "Correct." In the exchange that followed, Father refused to characterize Mother's response as an "offer" to allow additional visitation on Jewish holidays. He said that, because "she wanted things first," her response was "not really an offer," but "more of an ultimatum."

schedule.

In addition, Father offered testimony from the child's paternal grandfather ("Grandfather"). Grandfather stated that he has served as a rabbi for the past three decades and that he currently lives in Alabama. Grandfather discussed the particular significance of Yom Kippur and Rosh Hashanah for Jewish families. Typically, Grandfather would conduct special family services on those holidays, which would incorporate learning activities for children. Grandfather recalled that Father and O. had participated in the most recent Passover Seder through Zoom. Grandfather testified that, on weekends when O. stays with Father, Father arranges for O. to spend time with Grandfather through Zoom. During that time, Grandfather had been teaching O. how to read Hebrew letters.

Overall, in addition to requesting a few specific provisions, Father requested changes to the basic terms of the consent order. Father asked the court to grant him tie-breaking authority on medical issues, while also requiring Father to provide health insurance for the child. Along with his requests for changes to the holiday schedule, Father asked the court to establish a "week on/week off" physical custody schedule throughout the year.

D. Denial of Father's Request for Custody Modification

After Father presented his case, Mother's counsel "move[d] for judgment" in

Mother's favor.[5] Mother counsel argued that Father had failed to show any material change in circumstances that might warrant the modification of the terms of the consent order.

Father's counsel responded that "several" "significant" changes had occurred since the entry of the consent order. Counsel observed that the child had been about one-and-a-half years old at the time of the consent order, but was now seven years old. Counsel asserted that Father had recently changed jobs to allow him to work from home full time. Counsel stated that the two parents now lived farther away than they had at the time of the consent order. Counsel noted that, although the consent order envisioned that the parties would follow the Howard County public school calendar, the parties no longer lived in Howard County, and the child attended a private school. Counsel stated that, since the entry of the consent order, the parties had never resolved the issue of how to divide spring break and winter break. In addition, counsel argued that there "ha[d] been a change in the communication style[,] . . . in the sense that" Mother had shown a "reluctance" to consent to "flexible additional time."

The court concluded that Father had failed to establish "a material change in circumstances, such that [the court] should change legal custody or that [the court] should

[5] In civil cases tried without a jury, "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party[.]" Md. Rule 2-519(a). "When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence." Md. Rule 2-519(b).

change the access schedule."

In explaining its conclusion, the court stated that Father's ability to work from home had little to no bearing on the issue of custody. The court found that Father's recent move was not a material change in circumstances, observing that the parties still lived in "the Washington, D.C. area" and within "30 miles from each other" as envisioned in the consent order. For "clarification," the court announced that the parties should no longer follow the Howard County public school schedule and should follow "the schedule of the school the child attends, . . . going forward."

Addressing Father's requests for additional access on Jewish holidays, the court expressed "no doubt" that Yom Kippur and Rosh Hashanah are "very important holidays on the Jewish calendar." The court concluded, however, that Mother's response to Father's request for additional time on those holidays was "reasonable[,] . . . not unreasonable." The court explained: "What I heard here was that [Mother] has said to [Father] when he wanted these times, you can have them, but . . . you have to give up some other time."

The court found that the "existence of these holidays" was not a material change in circumstances. The court explained that "these holidays are not new holidays" and that Father "certainly could have" addressed those holidays when he agreed to the terms of the consent order. The court noted that, while the parties addressed other holidays in the consent order, "they elected, for whatever reason, not to" address Rosh Hashanah or Yom Kippur. The court concluded that "the fact that [Father] now wants to spend time with

his son on these holidays[] is not a material change."

Addressing the issue of winter break, the court observed that the consent order stated that the child would be in Mother's care from December 24th through December 28th every year. The court said that it would "clarify th[e] order with respect to equal time" during winter break, by requiring the child to be with Father beginning on December 28th and "spend that remaining part of winter break with [Father]." The court said that it would "let [the parties] decide" whether they would "alternate" spring break or "split it in half" each year. Father and his counsel told the court that Father "prefers to alternate" spring break and wanted to have the child for the upcoming spring break in 2022. The court granted that request.

The court announced that, other than the revisions to the schedule for winter break and spring break, the court would deny all other relief requested by Father.

On October 20, 2021, the circuit court entered an order denying Father's amended motion for modification of custody. The order stated that, "in accordance with the terms of the Consent Order," the winter break and spring break schedules would be as follows: the child would be with Father for spring break during even-numbered years and with Mother for spring break in odd-numbered years; and the child would be with Mother every year from Christmas Eve through December 28th, and with Father from December 28th through New Year's Eve. The order stated that all other terms of the consent order would remain in effect.

Within one week after the court entered the order denying Father's amended

motion for modification of custody, Father filed a notice of appeal.

More than 10 days after the court entered the order denying his amended motion for modification of custody, Father filed an unopposed motion to revise the circuit court's order. Father asserted that the paragraph concerning winter break "contain[ed] errors or mistakes." During the hearing, Father asserted, the court had announced that the child would be with Father every year until the morning of the child's first day of school in January. The order, however, stated that the regular physical custody schedule would resume on January 1st each year. In addition, Father asked the court to add a provision documenting the parties' agreement that the child would be with Father on the weekend after the child's thirteenth birthday.

Although the court's judgment was on appeal, the circuit court granted Father's motion to revise. The court revised its prior order to state that, every year, the child will be with Mother from dismissal on the last day of school before winter break through the afternoon of December 28th, and then with Father from the afternoon of December 28th through the morning of the first day of school after winter break. The court further ordered that, by agreement of the parties, the child would be with Father on the weekend after the child's thirteenth birthday. Father did not file a notice of appeal after the entry of the revised order.

DISCUSSION

In this appeal, Father asks this Court to reverse the order denying his amended motion for modification of custody. Father's appellate brief presents three issues. First,

Father contends that the court improperly restricted his testimony regarding access to the child on Jewish holidays. Second, Father contends that the court erred by finding that no material change in circumstances had occurred. Third, Father contends that the court erred by revising the physical custody schedule for winter breaks and spring breaks from the child's school.[6]

When deciding a request to modify legal or physical custody, the circuit court's foremost consideration is the best interests of the child. *Wagner v. Wagner*, 109 Md. App. 1, 29 (1996). A final custody order, including an order "entered by the consent and upon the agreement of the parties," may be modified only if the court concludes that circumstances have materially changed since the prior custody determination. *McCready v. McCready*, 323 Md. 476, 483 (1991). The purpose of this requirement is to preserve stability in custody arrangements and to prevent parties from relitigating the same issues decided in earlier proceedings. *Domingues v. Johnson*, 323 Md. 486, 498 (1991).

[6] Father presented the following questions, which we quote verbatim:

I. Did The Trial Court Abuse Its Discretion When It Restricted The Appellant From Explicitly Evidence With Respect To Material Change In Circumstances Pertaining To Requested Change In Physical Access[?]

II. Did The Court Abuse Its Discretion When It Found That There Were No Material Changes In Circumstances[?]

III. Did The Court Err When It Made Changes To The Consent Order With Respect To The Winter Holidays, But Denied Or Refused To Make Any Modifications With Respect To The Traditional Jewish Holidays Stating That Such Decisions "Should Have Been Contemplated At the Time The Initial Consent Order Was Made[?]

In determining whether to modify an existing custody order, the court typically uses a two-step analysis. *Santo v. Santo*, 448 Md. 620, 639 (2016). First, the court determines whether there has been a material change in circumstances since the prior custody determination; if so, then the court must decide whether modifying the custody arrangement is in the best interests of the child. *Id.* The party moving for modification bears the burden of showing "'that there has been a material change in circumstances since the entry of the [prior] custody order and that it is now in the best interest of the child for custody to be changed.'" *Gillespie v. Gillespie*, 206 Md. App. 146, 171-72 (2012) (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)). In this context, "[a] change in circumstances is 'material' only when it affects the welfare of the child." *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005).

Decisions on whether to modify custody or visitation "are generally within the sound discretion of the trial court[.]" *Barrett v. Ayres*, 186 Md. App. 1, 10 (2009). The scope of appellate review for a trial court's decision on a motion for modification of custody is narrow. *McCready v. McCready*, 323 Md. at 484. "We will not set aside factual findings made by the [trial court] unless clearly erroneous, and we will not interfere with a decision regarding custody that is founded upon sound legal principles unless there is a clear showing that the [trial court] abused [its] discretion." *Id.* (citing *Davis v. Davis*, 280 Md. 119, 124-26 (1977)). When scrutinizing factual findings, "we give 'due regard . . . to the opportunity of the [trial] court to judge the credibility of witnesses.'" *Gillespie v. Gillespie*, 206 Md. App. at 171 (quoting *In re Yve S.*, 373 Md.

551, 584 (2003)).

The abuse-of-discretion standard "accounts for the trial court's 'opportunity to observe the demeanor and the credibility of the parties and the witnesses.'" *Jose v. Jose*, 237 Md. App. 588, 599 (2018) (citing *Petrini v. Petrini*, 336 Md. 453, 470 (1994)). "An abuse of discretion arises 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 v. Jose*, 237 Md. App. at 598-99 (quoting *Santo v. Santo*, 448 Md. at 625-26). Accordingly, "'[a]n abuse of discretion should only be found in the extraordinary, exceptional, or most egregious case.'" *B.O. v. S.O.*, 252 Md. App. 486, 502 (2021) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 199 (2005)).

I. Limits on the Scope of Father's Testimony

In his first challenge to the denial of his amended motion for modification of custody, Father contends that the circuit court abused its discretion when it sustained certain objections made during his testimony. As Father recognizes, this Court generally reviews rulings on the admissibility of evidence under the abuse-of-discretion standard. *See, e.g., Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594, 619-20 (2011). An appellant seeking the reversal of a judgment based on an evidentiary ruling must show that the ruling was wrong and that the ruling was likely to have affected the

outcome of the case. *Gillespie v. Gillespie*, 206 Md. App. 146, 169 (2012).

In his appellate brief, Father argues that the circuit court "refused to allow Father to explain why Mother's refusal to accommodate visitations during the Jewish holidays of Rosh Hashanah and Yom Kippur constituted a material change in circumstance[s]." According to Father, the court's rulings "essentially foreclosed Father from demonstrating that there had been a material change in circumstances regarding how Father and [O.] were able to observe and celebrate the Jewish holidays together."

The hearing transcript does not support Father's characterizations of the court's rulings. At the hearing, the court made two rulings limiting the scope of Father's testimony. First, the court precluded Father from testifying about an agreement known as a ketubah, which Father and Mother had made at the time of their wedding. Later, the court precluded Father from testifying about his own subjective understanding of part of the consent order. At no point did the court preclude Father from testifying about Mother's alleged refusal to allow access on Jewish holidays. In fact, the court specifically permitted Father to testify about his requests for additional access on Yom Kippur and Rosh Hashanah in 2021 and about Mother's responses to those requests.

During his testimony, Father explained that he was seeking a "week on/week off" physical custody schedule, in part, so that O. would have additional opportunities to participate in weekly Shabbat services with Father. Father's counsel proceeded to ask: "when you and [Mother] were married, did you have any discussions about religious issues[?]" In response, Father said that the parties had entered into a ketubah. Counsel

asked Father to explain what a ketubah is. Father answered:

> [FATHER:] A [ketubah] is a Jewish contract that is signed by both parties, signed in front of witnesses. On the day of the wedding, we both agree and we recite out loud that we intend to treat each other with love and respect and that we intend to raise our children –

At that point, Mother's counsel objected. The court sustained the objection, stating that the testimony was "not relevant." Father's counsel began to introduce another question, stating: "And you have an agreement with respect to the . . . ." Before counsel could finish asking the question, the court reiterated: "again, it's not relevant, sustained."

In an ensuing discussion, Father's counsel told the court that "[o]ne of [Father's] allegations" was Mother's "failure to allow him to have access on Jewish holidays." The court gave the following explanation for its ruling:

> THE COURT: They have an agreement . . . about access. . . . I'm going to presume [Father] was Jewish when he entered that agreement, that the [ketubah] that you're talking about was entered prior to the child's birth. . . . So it's not like anyone converted and now there's this change in circumstance, this was the circumstance at the time the agreement was made. So whatever happened or whatever was wanted at that time should have been dealt with. But that's not relevant to what we're doing. . . . It's not relevant to modification.

Father's counsel then offered to "lay a proper foundation" for the questions. The court continued its explanation:

> THE COURT: No, I'm saying to you, it's not relevant because the [ketubah] that's being discussed was around at the time that this consent order was made. . . . They didn't put any provision about Jewish holiday because they have the holidays in here that they agreed to. So if you're trying to change the order now to give him access on Jewish holidays, . . . there's no material change. It's a matter of law and fact. . . . Because when

> the child was born, they knew he was going to be older and these orders, [counsel], as you know they're done . . . to try to make them perpetual to the extent they can be. And . . . the matter of faith is not a new issue. You're asking him about an agreement they had prior to them being married. That agreement would have been in effect at the time they entered the consent order. If [Father's] faith and his wanting to raise his son in that faith was so strong that it was important, that should have been agreed to at the time. You can't now come back and say, years later, all right, the kid's older now, I want him to practice the faith more.

Father's counsel said that Father was "basically just discussing . . . his access during . . . Jewish holidays." Father's counsel suggested that he was attempting to show "that the schedule has to change for the best interest of the child." The court responded:

> THE COURT: [W]hat I'm saying to you is, I understand all of those things. But you're going back to . . . some agreement that had been reached prior to the child's birth. So that when the child was born and this order arose, that agreement existed and the parties didn't make a provision. They made a provision for every holiday under the sun except for religious holidays.

Father's counsel then said that he would "go through it in a different manner[.]" Father's counsel directed attention to the "special events" paragraph of the consent order.[7] Father's counsel asked, "what was your interpretation when you look at your special events clauses?" Mother's counsel objected on the ground that the consent order "speaks for itself." The court agreed with that statement. The court questioned the value

[7] In full, this paragraph of the consent order states:

> Special Events. Each party shall cooperate and consent to make the minor child available for special events at the request of the other party, said consent not to be unreasonably withheld, upon 30 days[']notice and with make-up visitation to be provided following the event on the next available weekend, or weekday, whichever may be appropriate.

of testimony about Father's subjective interpretation of the consent order, stating: "[S]o you're going to tell me that he thinks special events means X. What if she tells me special events means Y[?]"

Father's counsel asserted that the consent order was "ambiguous" and that the term "special events" could include "different holidays that are important" in a parent's religious tradition. The court said that it did not "interpret special events as meaning Jewish holiday celebrations." The court reasoned that the kinds of "special events" mentioned in the consent order might include, for example, a wedding scheduled on a day when the parent did not have physical custody of the child, but would not include religious holidays that occur every year.

Father's counsel proceeded to ask whether the parties had had any discussions during the previous year regarding Yom Kippur or Rosh Hashanah. Mother's counsel objected. The court overruled her objection, stating that Father could testify about "what he asked for" on those two holidays in the past year.

Answering the question, Father said that he "requested under the special events clause" that Mother "consent to make [O.] . . . available for the special event," as "[he] defined it, which in this case was Yom Kippur and Rosh Hashanah[.]" Father added: "I never understood in the original entered consent order that there were any definitions on what a special event was or who could define it."

Father recounted that, in August 2021, he emailed Mother to ask for her consent to allow O. to stay with him on one night for Rosh Hashanah and two nights for Yom

Kippur. Father said that he made this request because he "wanted [O.] to experience his Jewish faith" and "culture." Father said that O.'s paternal grandfather was "holding a virtual service" for "the first time in his 30 years of practice." Father said that he thought that those days "would be a good chance" for O. to "be with his extended family." Mother's counsel objected, and the court again overruled the objection.

Father testified that Mother "said no" to his request. Father said that "she took it as an opportunity to say, well what about this four year time in order to do it,[8] and said that [he] was bullying her" by making his request. Following their discussion, Father did not have access to the child on either Yom Kippur or Rosh Hashanah in 2021. During cross-examination, Father acknowledged that Mother asked for make-up days with the child first before she would agree to give Father additional days.

On appeal, Father contends that the court's rulings limiting the scope of his testimony were "unreasonable." Father argues that "[t]he child's interests in Judaism, and Father's interest in observing and celebrating with [O.]," should be "permitted to grow and evolve" over time. Father argues that he should have been allowed to testify about his "growth and evolution in his religious beliefs and practices, as well as his desires to have his growing son participate in them," and about what he calls "Mother's refusal to reasonably adapt to the changing dynamic[.]"

Father's arguments fail to acknowledge, let alone refute, the court's primary rationale for precluding testimony about the ketubah. The court repeatedly emphasized

[8] The meaning of the Father's comment is not apparent from the record.

that the decisive factor was timing: the ketubah was "an agreement that [the parties] reached prior to their marriage." The court reasoned that the content of whatever agreement the parties may have made at the time of their wedding in 2011 had no bearing on the issue of whether the court should modify the terms of the consent order embodying their agreement in 2016. The consent order, which purports to memorialize the "agreement resolving all issues arising from their marriage to one another," overrides whatever prior agreement may have made existed at the start of their marriage. Father does not explain the connection between testimony about the ketubah and his (or the child's) growth and evolution in religious beliefs and practices since Father agreed to the terms of the consent order. We fail to see how precluding testimony about the ketubah prevented Father from testifying about changes occurring after the entry of the consent order. Indeed, the record fails to disclose what testimony Father would have offered if the court had permitted him to answer questions about the ketubah.

Maryland Rule 5-103(a)(2) states that "[e]rror may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." Accordingly, "[w]here the evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal." *South Kaywood Cmty. Ass'n v. Long*, 208 Md. App. 135, 164 (2012) (quotation marks omitted). The purpose of this rule is to ensure that an appellate court can review the trial court's

evidentiary ruling. *See University of Maryland Med. Sys. Corp. v. Waldt*, 411 Md. 207, 235 (2009). "Without a proffer, it is impossible for appellate courts to determine whether there was prejudicial error or not." *Id.*

When the court sustained Mother's objections to Father's testimony about the ketubah, Father's counsel made no proffer of the substance of the testimony. The substance of the testimony was by no means apparent from the context. Because the record fails to disclose the testimony that Father might have offered in response to questions about the ketubah, Father is unable to show that he sustained any prejudice from the decision to preclude his testimony on that matter. Accordingly, the issue is not adequately preserved for appellate review. *See South Kaywood Cmty. Ass'n v. Long*, 208 Md. App. at 163-64.

Father also challenges the exclusion of testimony about his own "interpretation" of the "special events" paragraph of the consent order. The court sustained Mother's objection on the ground that the consent order "speaks for itself." The court expressed the view that neither parent should be permitted to testify about the parent's subjective interpretations of the terms of the consent order. This view is well founded. Generally, the "true test" of what a contract means "is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Dennis v. Fire & Police Employees' Ret. Sys.*, 390 Md. 639, 656-57 (2006) (quotation marks omitted). Absent an ambiguity in the language of a contract, the court ordinarily should not inquire into the subjective understandings or intent of the parties.

Id. at 658.

The circuit court concluded that, because the consent order included a comprehensive schedule for annual holidays, the term "special events" did not include religious holidays. Father disagrees, asserting that holidays such as Yom Kippur and Rosh Hashanah are "inherently 'special'" in the Jewish religion. Father's argument fails to address the actual basis for the court's distinction. The court expressly recognized the exceptional importance of those religious holidays, but reasoned that a "special event[]" meant something other than a holiday that occurs every year, like the holidays specifically addressed in the consent order. In the context of the entire agreement, the court construed the term "special events" to mean events that do not occur every year and thus were unknown to the parties at the time of the consent order.

When the court sustained the objection to the question about Father's interpretation of the "special events" paragraph, Father's counsel made no proffer of what Father's answer would have been. Almost immediately afterwards, however, Father went on to discuss his interpretation of that paragraph. Father testified that, during 2021, Father "requested under the special events clause" that Mother make the child available for a "special event" as "[he] defined it, which in this case was Yom Kippur and Rosh Hashanah[.]" The court received this testimony without objection from Mother. When Mother's counsel later objected to additional questions on the topic, the court overruled her objections.

Ultimately, therefore, Father was allowed to testify that he interpreted the "special

events" paragraph to include religious holidays such as Yom Kippur and Rosh Hashanah. The court no doubt understood what Father's interpretation of the special events paragraph was. Because the court ultimately received this testimony anyway, Father sustained no prejudice from any alleged error in the initial ruling. *See Angelakis v. Teimourian*, 150 Md. App. 507, 525-27 (2003) (holding that exclusion of evidence was harmless where the witness "testified as to the substance" of the excluded evidence at a different point during trial, thereby "reduc[ing] [the excluded evidence] to cumulative evidence").

Father has failed to establish that the trial court abused its discretion in limiting the scope of his testimony or that he suffered prejudice from the court's rulings. There is a wide disparity between the particular evidentiary rulings made at the hearing and the sweeping complaints made in Father's appellate briefs. The transcript shows that the court precluded Father's testimony about an agreement that the parties made at the time of their wedding and about his interpretation of part of the consent order. Father insists that the court prohibited him from testifying about purported changes in "the child's interests" in religion and "Father's growth and evolution in his religious beliefs and practices" since the entry of the consent order. The court's rulings did not preclude testimony on those matters, nor did Father even offer testimony on those matters. We agree with Mother's observation that the court gave Father "ample opportunity to testify as to what he believed to be a material change in circumstances."

II. Failure to Find Material Change in Circumstances

As the second issue in this appeal, Father contends that the circuit court abused its discretion when it found that Father had not established a material change in circumstances warranting a modification of custody.

"'In [the custody modification] context, the term "material" relates to a change that may affect the welfare of a child.'" *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996)). "A change in circumstances which, when weighed together with all other relevant facts, requires a court to revise its view of what is in the future best interest of a child, is a sufficient change" to justify modification. *Domingues v. Johnson*, 323 Md. 486, 500 (1991). A party can satisfy the materiality requirement by demonstrating "that an existing provision concerning custody or visitation is no longer in the best interest of the child and that the requested [modification] is in the child's best interest[.]" *McMahon v. Piazze*, 162 Md. App. 588, 596 (2005).

To assess whether any "change" has occurred, the court ordinarily evaluates the present circumstances in relation to "the circumstances known to the trial court when it rendered the prior order." *Wagner v. Wagner*, 109 Md. App. at 28. Where "the party seeking modification of a custody is offering nothing new, and is simply attempting to relitigate the earlier determination, the effort will fail on that ground alone." *McCready v. McCready*, 323 Md. 476, 482 (1991). Where a party presents "some evidence of changes which have occurred since the earlier determination was made[,]" the court must

"[d]ecid[e] whether those changes are sufficient to require a change in custody[.]" *Id.* The court must deny the motion for modification if it determines that, "in respect to the previously known circumstances[,] 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[.]" *Wagner v. Wagner*, 109 Md. App. at 29 (emphasis in original).

In his appellate brief, Father offers a list of various circumstances which, in his view, justified a modification of custody. Whether viewed individually or collectively, the evidence of these purported changes did not compel the circuit court to conclude that Father had met his burden of proving a material change in circumstances.

Father points to the child's increased age as a potential change in circumstances. O. was younger than two years old at the time of the consent order, and O. was seven years old at the time of the custody modification hearing. By itself, "the increased age of the child" is a "particularly unpersuasive" reason to modify custody "'because aging is an inexorable progression prevalent in all custodial cases.'" *McMahon v. Piazze*, 162 Md. App. at 596 (quoting *Campbell v. Campbell*, 477 S.W.2d 376, 378 (Tex. Civ. App. 1972)). The circuit court here was not required to conclude that the custody arrangement established in the consent order was no longer in the child's best interests, merely because the child was seven years old.

Father deems it significant that O. now attends a private school located in Prince George's County. In the consent order, the parties agreed "to follow the Howard County Public School calendar to determine holidays and days off from school, *unless the*

schedule at the minor child's school/daytime activity is different." (Emphasis added.) Father's testimony included no indication that this provision had created any confusion or conflict between the parties now that the child was enrolled in a private school. In its ruling, the circuit court explained that the consent order referred to the Howard County public school system because the order "was done at a time when the child was not in school[.]" The court announced, "just for clarification, . . . it will be the schedule of the school the child attends . . . going forward." The court said that it will be unnecessary "to revisit" the school calendar provision whenever the child changes schools because the schedule will "always be the schedule of the school that the child attends." In short, the court construed the consent order not to require use of the Howard County public school schedule because the child's school used a different schedule. We see nothing unreasonable in this interpretation. Father does not affirmatively argue that this interpretation was erroneous.

Father finds it significant that both parties have relocated since the consent order, as Mother has moved to Greenbelt and Father to Washington, D.C. It is true that "[c]hanges brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody." *Domingues v. Johnson*, 323 Md. at 500. Where parents have shared physical custody, "a move of any substantial distance . . . may not be in the best interest of the child." *Id.* at 502. For example, this Court upheld a finding of a material change in circumstances where the parent with primary physical custody of the child unilaterally moved from Maryland to Arizona with the intention of separating the

child from the other parent. *Braun v. Headley*, 131 Md. App. 588, 612-13 (2000). In the present case, by contrast, we see no obvious connection between the relocation of the parents and the child's welfare. According to Father's testimony, he requires about 30 minutes to drive from his home to the child's school or to Mother's home. This evidence by no means compelled the conclusion that the existing custody arrangement was no longer in the child's best interests.

Father asserts that his change of jobs, from a "9 to 5 job at the time of the consent order" to a job that allowed him to "exclusively work[] from home," is a material change in circumstances. In this regard, the circuit court stated that "the fact that a parent is home during the day bears no significance to the parent's availability to care for the child," "particularly when then the child is in school" and the parent's access "is going to be in the evenings or outside of school time[.]" The court reasoned that, because it is not uncommon for a parent to change jobs, revisiting the physical custody schedule every time one parent changes jobs would not "serve any purpose other than to keep litigation going[.]" In short, the court determined that the marginal increase in Father's availability was not an adequate reason to disrupt the stability of the existing custody arrangement. We see nothing unreasonable in the court's conclusion that Father's change of jobs did not amount to a material change in circumstances.

Father seeks to rely on his testimony about what he calls "travel delays." Father testified that, during the summer of 2021, Mother did not deliver the child's passport to him until the day Father was scheduled to take the child on a vacation to Canada to visit

members of his wife's family. Mother initially withheld the child's passport because of restrictions on non-essential travel during the COVID-19 pandemic. In his testimony, Father acknowledged that those restrictions were still in place "at the beginning of the trip" and were lifted "two days later." Although the delay in receiving the child's passport did not prevent the child from travelling with Father, Father testified that, if he had received the passport two weeks earlier, he would have been able to apply for a "fast pass" to expedite "the whole customs process." At most, this evidence established that Father and the child experienced some unspecified degree of inconvenience during their vacation, apparently as the result of a difference of opinion about travel restrictions during the pandemic. This incident falls short of a material change in circumstances warranting custody modification.

Father asserts that the evidence at the hearing established "clothing and gender-identity concerns" that did not exist at the time of the consent order. Father and his wife testified that, for some period of time, Mother provided "girls' clothing" for the child even though, according to Father, the child identifies as male. Father acknowledged that these occasions stopped occurring in March 2020, more than a year and a half before the hearing. Father mentioned that, in May 2020, the child's school reported that the child had been "bull[ied]" in some unspecified way by a classmate. Father's testimony did not establish the severity of the incident, nor did it indicate that the child was experiencing ongoing issues with classmates by the time of hearing. It is certainly true that, under some circumstances, a parent's decisions regarding a child's gender-identity may affect

the child's welfare. *See In re K.L.*, 252 Md. App. 148, 196 (2021). The evidence here failed to show that the existing custody arrangement impaired or threatened to impair the child's best interests.

Father calls attention to the lack of cooperation between the parents over the selection of a therapist for the child. Similarly, Father notes that the child has no primary care physician, despite his efforts to work with Mother to select one. The circuit court was not required to conclude that these issues amounted to a material change in circumstances. By all indications, both parents were actively involved in the child's healthcare decisions and were ensuring that the child receives appropriate care. Even if Father believed that the child would benefit from having a therapist and a primary care physician, the evidence did not show that the child had any particular need for physical or mental health treatment in addition to the care already provided by both parents.

More generally, Father argues that, "although the parties communicated frequently," their communication had substantially worsened since the entry of the consent order and subsequent custody modification hearings. To be sure, communication between parents is an important factor in assessing whether joint legal custody is appropriate. *Santo v. Santo*, 448 Md. 620, 628 (2016) (citing *Taylor v. Taylor*, 306 Md. 290, 304 (1986)). Where parents share joint legal custody, a parent with tie-breaking authority is obligated to communicate in good faith with the other parent before making a final decision. *Santo v. Santo*, 448 Md. at 634 (discussing *Downing v. Perry*, 123 A.3d 474, 483-85 (D.C. 2015)). In this case, the communication between the parents was not

so ineffective as to require the court to reevaluate the tie-breaking provision from the consent order. The court was entitled to conclude that Father's complaints about Mother's decisions were overstated and that the instances of conflict largely reflected good-faith disagreements about the child's best interests.

As another potential change, Father asserts: "There was a clear change as to how and whether the Father was afforded sufficient time to celebrate important Jewish holidays with [O.]" The circuit court did not share Father's view of the evidence. As the court explained, Father previously had agreed to the terms of the consent order, which established a comprehensive holiday schedule that did not include Jewish holidays. Under the consent order, Father celebrated Jewish holidays with the child only when those holidays happened to overlap with his regular access periods. The court reasoned that the only new circumstance was "that [Father] now wants to spend time with his son on these holidays," which "is not a material change." We agree that a parent's desire for additional time with a child is not a sufficient change to modify a custody order. Otherwise, a parent could compel the reevaluation of any shared physical custody order simply by requesting additional time with the child.

Under certain circumstances, fundamental disagreements between parents regarding a child's religious observances can give rise to a material change in circumstances. *See Bienenfeld v. Bennett-White*, 91 Md. App. 488, 500-02 (1992). Father has attempted to characterize the issue here as something other than a change in his preferences and instead as an issue of Mother's unreasonable refusal to accommodate

his requests for additional time on Jewish holidays. Father testified that, in 2021, he requested additional overnight visitation for Yom Kippur and Rosh Hashanah, purporting to invoke the "special events" paragraph of the consent order. In response, Mother said that she would grant additional visitation only if Father first gave her additional time with the child.[9] The court found: "[Mother] has said to [Father] when he wanted these times, you can have them, but . . . you have to give up some other time." The court's interpretation of Father's testimony is not clearly erroneous. The court further concluded that Mother's request for make-up time was reasonable. Because the court rejected Father's allegation that Mother had refused access to the child on Jewish holidays, the court necessarily concluded that her conduct did not amount to a material change in circumstances.

According to Father, the "most important[]" change in circumstances was that "the child expressed a sincere desire to spend additional time with his [f]ather." Father also asserts that O. "wanted to be more involved and participate in Jewish culture and religious practices[.]" Father's briefs do not include citations to any part of the record which might support these factual assertions. O. did not testify at the hearing, nor did the court conduct an interview with the child.[10]

[9] Father explains in his brief that Mother "offered to give him those holidays, but Father did not want to do this if she insisted first on getting time back in return."

[10] Although Father does not mention this fact in his brief, Father introduced a short video recording of the child responding to a series of questions and prompts by Father: "[D]o you want equal time with both parents?"; "Say it."; "Am I making it up?"; and

Although Father's counsel offered to have the child appear remotely from school, the court declined to hear from the child. The court explained that, although it might consider testimony of "a seven year old talking about something that happened to him or her in the context of some other matter[,]" it "probably would not give a whole lot of weight to something a seven year old tells [the court] in a case involving a dispute between the parents[.]" Generally, the court is not required to speak with the child in a disputed custody case, and the decision of whether to do so rests within the discretion of the court. *See Karanikas v. Cartwright*, 209 Md. App. 571, 590 (2013). In light of the child's age and the nature of this case, we perceive no abuse of discretion in the court's decision to decline to speak with the child about the child's preferences.

Based on all the evidence presented, the circuit court was justified in concluding that the purported changes did not amount to a material change in circumstances that might warrant modification of legal or physical custody.[11] Consequently, the court did not err in denying Father's motion to modify the consent order.

III. Order Concerning Winter Break and Spring Break

As the final issue in this appeal, Father contends that the circuit court abused its discretion when it revised the access schedule for winter break and spring break. We

"Am I telling you what to say?" The court was not required to give any weight to the seven-year-old child's responses to Father in that context.

[11] Father's list of purported changes also includes the parties' lack of agreement on the division of winter breaks and spring breaks. Because Father raises more specific complaints about the court's treatment of that issue as the third issue in his appeal, we will address that issue in Part III of this discussion.

conclude that Father waived his objection to the court's revisions to the schedule for spring break. We further conclude that Father's challenge to the schedule for winter break is not properly before us, because Father did not appeal from the governing order on the issue of winter break.

The record reveals that the circuit court addressed the issues of winter break and spring break only because Father affirmatively asked the court to do so. As previously mentioned, the consent order established no schedule for winter break or spring break, stating that the parties would "revisit the issue . . . with the intention of equally sharing the minor child's time during those breaks once the minor child is enrolled in school." At the hearing, Father's counsel asserted that the parties had failed to resolve the issue of dividing those breaks now that the child was in school.

In his testimony, Father was asked to explain his "position" regarding the access schedule for winter break and spring break. With respect to spring break, Father said that he wanted to "[s]plit it evenly down the middle" each year or to "alternate it year-after-year." Father said that, under an alternating schedule for spring break, he would prefer to have the child on spring break for "even years," including the "upcoming year" of 2022. Father described winter break at the child's current school as "a two week long break . . . at the end of December." Father proposed that Mother should "have the first week of winter break" because "she loves Christmas," and that Father should "have the second week" of winter break each year.

When Mother moved for judgment at the close of Father's case, Father's counsel

argued: "One of the main reasons we're here is because they could not resolve how to divide spring break and winter break, which is significant alone since that was required . . . in the consent order." Counsel argued: "So at a very minimal standard, that would have to be addressed, because the order actually said the parties had to do it, and they have not."

The court questioned whether addressing the division of spring break and winter break would be a "modification" of the consent order or "just an adjustment that was contemplated in the order that exists." Specifically, the court asked whether it would be necessary to examine "all of the factors regarding child custody . . . just to adjust the holiday schedule which was contemplated in [the consent order] already[.]"[12]

The discussion continued:

> THE COURT: Actually what the order says is . . . that they would share equal time. Why do I need to go through all the factors just to give them equal time, since they want me to do it, since they didn't do it?
>
> [FATHER'S COUNSEL:] Well, in that regard we wouldn't, you're right.
>
> * * *
>
> THE COURT: So am I modifying the order just by saying, you'll spend equal time and the time will be from this date to that date, is that a modification or is that just an adjustment? Because I'm not taking anything away from anyone or giving anyone anything, other than what they have already agreed to.
>
> [FATHER'S COUNSEL:] If you're clarifying something that's already in the order, then no, that would be --

[12] *See generally Azizova v. Suleymanov*, 243 Md. App. 340, 345-46 (2019) (providing a non-exhaustive list of 21 factors that a court must consider when making custody determinations).

> THE COURT: It's already in the order that their intent is that it would be split equally.
>
> [FATHER'S COUNSEL:] Yes. . . . I agree with you there, because then it would just be clarifying something where they disagree about that's already in the existing order, correct.

In other words, as stated in Father's reply brief, Father's counsel "agreed" that if the court was "only ensuring that the parties would have equal time during the breaks," it would be unnecessary for the court to conduct a full analysis of the child's best interests.

After finding that Father had failed to demonstrate the existence of a material change in circumstances, the court went on to address Father's requests for dividing winter break and spring break. The court noted that the consent order stated that the child would be with Mother every year for Christmas, from Christmas Eve through December 28th. The court said that it would use December 28th as the "demarcation line" for winter break. The court said that it would "clarify" the consent order "with respect to equal time[,]" by providing that the child would spend "the remaining part of winter break" after December 28th "with his father regardless of the regular schedule." The court said that this determination would "fix[] the contemplation of equal time."

Addressing spring break, the court said that it would "let [the parties] decide" whether they wanted to "split" the child's time "equally every year" or whether they wanted to "alternate years[.]" Father's counsel said that his client "prefer[red] to alternate" spring break, "one year with mom, one year with dad[.]" The court recalled that, during Father's testimony, he said that he wanted to have the child for the upcoming

spring break in 2022. The court asked, "[s]o is that okay with you, [Father]?" Father responded, "[s]ure." The court announced: "So commencing in 2022, spring break we'll alternate between the parents with [Father] having it in even years, as he requested."

The court entered a written order denying Father's motion for modification of custody on October 20, 2021. The order included "Winter and Spring Break schedules," which, the court said, were "in accordance with the terms of the Consent Order[.]" The order stated that, every year, the child would be with Mother from the morning of December 24th until the afternoon of December 28th and then with Father until the afternoon of December 31st, at which point the regular schedule would resume. The order stated that, starting in 2022, the child would be with Father for spring break during even-numbered years and with Mother for spring break in odd-numbered years.

On October 25, 2021, Father noted his appeal from the order denying his motion for modification. A few weeks later, on November 12, 2021, Father filed a motion under Md. Rule 2-535(a), asking the court to revise its order.[13] Father asserted that the paragraph concerning winter break did not accurately reflect the court's oral ruling. Father asked the court to revise its order to state that the child would be with Father each

[13] The circuit court's docket entries state that Father filed his motion to revise on November 12, 2021. The motion itself was not included in the record that was transmitted to this Court. At this Court's request, Father supplemented the record with a scanned copy of the motion. The copy that he provided bears a stamp from the clerk of the circuit court. Although the image is not entirely clear, the stamp appears to say "2021 NOV 2." In any event, even if Father filed the motion on November 2, 2021, his revisory motion was filed after the 10-day period for filing a motion to alter or amend under Md. Rule 2-534.

year until the morning of the first day of school in January (rather than the morning of December 31st). Father informed the court that Mother consented to those proposed revisions to the order regarding the winter break schedule.

At the time that Father filed his motion to revise, Mother had already filed a response in which she asked the court to grant Father's motion to revise. According to Mother, "the parties agreed" that the child would be with Mother from the beginning of each winter break until December 28th and then with Father for the remainder of each winter break.

On January 28, 2022, the circuit court granted Father's motion to revise. As requested by the parties, the court revised the order to state that, every year, the child would be with Mother from the start of winter break until the afternoon of December 28th, and then with Father until the morning of the first day of school concluding the break. Father did not file a second notice of appeal from that order.

In this appeal from the earlier (unrevised) order, Father makes two separate complaints about the court's treatment of winter break and spring break. In one section of his appellate brief, Father faults the court for failing to find that the parents' inability to reach an agreement on the division of winter break and spring break amounted to a material change in circumstances. In another section of his brief, Father contends that the court abused its discretion by modifying the access schedule for winter break and spring break without making the threshold finding of a material change in circumstances.

In support of the second argument, Father cites *McMahon v. Piazze*, 162 Md. App.

588 (2005). In that case, this Court rejected a parent's argument that he was not required to show a material change in circumstances when requesting "minor" changes to a visitation schedule. *Id.* at 594. This Court reasoned that "the purpose underlying the material change requirement is the same, whether the requested change is in custody or in a visitation schedule[.]" *Id.* The Court explained: "The 'material change' standard ensures that principles of *res judicata* are not violated by requiring that such a showing must be made *any time* a party to a custody or visitation order wishes to make a contested change, even if it is to an arguably minor term." *Id.* at 596 (emphasis in original). The Court rejected the contention "that a different standard applies to petitions for 'minor' modifications to the terms of a custody order." *Id.*

Father argues here that, although the circuit court described its action as a "clarif[ication]" of the consent order, the order changing the access schedule for winter break and spring break constituted a modification of physical custody. According to Father, the court could not make this modification unless it found that a material change in circumstances had occurred and that the modification was in the child's best interests.

Father's argument seems to presume that any showing of circumstances that is sufficient to justify modification of one provision in a custody order means that all terms of the custody order require reevaluation. According to Father, when the court granted his request to modify the access schedule for winter break and spring break, the court "could have considered Father's other requests for the addition of some of the Jewish holidays, guidance on exchanging the child's passport, as well as[] the legal custody

issues with respect to tie-breaking authority." Father does not cite any authority in support of this approach to custody modification. We see no reason why a finding that the parties' lack of agreement regarding winter break and spring break was a material change in circumstances would require the court to reevaluate other provisions that are unrelated to that finding. Such a requirement would undermine the goals of "preserv[ing] stability for the child" and "prevent[ing] relitigation of the same issues" resolved in earlier proceedings. *McMahon v. Piazze*, 162 Md. App. at 596.

To the extent that Father is challenging the order establishing the access schedule for spring break, he has waived that challenge. At the hearing, Father specifically asked the court to establish an alternating schedule for spring break, under which Father would have the child in even-numbered years beginning in 2022. Father cannot be heard to argue on appeal that the circuit court erred in granting him exactly the spring break schedule that he requested. *See Hughes v. Hughes*, 80 Md. App. 216, 230-31 (1989) (citing Md. Rule 8-131(a)).

With respect to winter break, Father's request was less specific. Father asked the court to divide winter break "evenly" each year, so that Mother would have the child for "the first week" of winter break and Father would have the child for "the second week" of winter break. Father's counsel agreed that, if the court divided the break "equally," the court would be "clarifying" the existing order rather than modifying the order. Taking this invitation to "clarify" the "contemplation of equal time" from the consent order, the court selected December 28th as the dividing line between Mother's portion of winter

break and Father's portion of winter break.

On appeal, Father disputes whether this schedule actually grants him equal time with the child during winter break. He agrees that Mother should continue to have the child for Christmas Eve and Christmas Day each year. He asserts, however, that dividing the break on December 28th fails to divide winter break "equally" and disproportionately favors Mother.

As we see it, this problem is one of Father's own making. At the hearing, Father described the winter break as a two-week break at the end of December, but he did not provide detailed information about the calendar at the child's school. Because the record does not include that information, we are unable to say whether he is correct in asserting that the order fails to divide winter break equally between the parties.

In any event, for the purpose of this appeal from the circuit court's initial order, Father's challenge to the winter break schedule has become moot. Generally, an appellate challenge to a custody order becomes moot when the order is replaced by a subsequent governing order. *See Cabrera v. Mercado*, 230 Md. App. 37, 85-87 (2016). In that situation, an appellate court deciding an appeal from the earlier custody order is unable to provide an effective remedy. *Id.* at 85. Even if the appellate court reverses or vacates the earlier, superseded order, the subsequent order remains the governing custody order. *Id.* at 85-86.

In this case, Father noted a timely appeal from the order entered on October 20, 2021. But more than 10 days (and fewer than 30 days) after the court entered its order,

Father filed a motion to revise under Md. Rule 2-535(a). The court later granted the motion, revising the portion of the order which related to winter break. When the court entered the revised order, the revised order replaced the earlier order and became the effective order. *See Ireton v. Chambers*, 229 Md. App. 149, 153 (2016) (citing *Gluckstern v. Sutton*, 319 Md. 634, 651 (1990); *Yarema v. Exxon Corp.*, 305 Md. 219, 240-41 (1986)). Consequently, when conducting appellate review of the order entered on October 20, 2021, this Court cannot provide an effective remedy. Even if this Court vacated the earlier order, the revised order (entered on January 28, 2022) would still be the governing order on the issue of winter break. *See Cabreba v. Mercado*, 230 Md. App. at 85-86.

Father's notice of appeal does not relate forward to the date of the revised order.[14] "[A]s a general rule, where a motion under Rule 2-535(a) is filed more than 10 days, but less than 30 days, after the entry of a judgment and a timely notice of appeal is filed either before or after that motion, the circuit court should not decide the motion." *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 66 (2013). If the circuit court rules on the Rule 2-535(a) motion in a way that affects the subject matter or justiciability of the pending appeal, the revised order is "valid, yet subject to reversal on appeal if it affected

[14] When a party files a motion to alter or amend a judgment within 10 days of a judgment under Md. Rule 2-534, a notice of appeal from the underlying judgment relates forward to the date of the court's ruling disposing of the motion. *See* Md. Rule 8-202(c); *Edsall v. Anne Arundel County*, 332 Md. 502, 508 (1993). By contrast, a motion filed more than 10 days after a judgment but within 30 days of the judgment, under Rule 2-535(a), has "no effect upon the running of the thirty-day appeal period." *Unnamed Attorney v. Attorney Grievance Comm'n*, 303 Md. 473, 486 (1985).

'the subject matter or justiciability of the appeal.'" *Id.* at 67 (quoting *Kent Island, LLC v. DiNapoli*, 430 Md. 348, 361 (2013)). The appellate court, however, cannot review the amended order unless a party appeals from the amended order. "[A] notice of appeal must be filed within 30 days after the entry of the trial court's ruling on a motion filed more than 10 days after entry of a judgment for this Court to have jurisdiction to review such ruling." *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. at 68. Here, because Father did not appeal from the amended order that the court entered on January 28, 2022, that order is not before us for appellate review.

In sum, Father affirmatively waived his challenge to the order granting his request to revise the schedule for spring break. To the extent that Father contends that the winter break schedule is less favorable than what he requested, that issue is not properly before this Court because Father did not appeal from the governing order on that issue.

ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.