Circuit Court for Calvert County
Case No. 04-C-12-000106

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1381

September Term, 2021

JOEL ANDREW ARTHUR

v.

SHELBIE LYNN WALL

Graeff,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: June 13, 2022

Joel Andrew Arthur ("Father") appeals from a judgment of the Circuit Court for Calvert County granting the petition of Shelbie Lynn Wall ("Mother") to modify visitation with the parties' eleven-year-old daughter. Father argues that the circuit court abused its discretion in denying his motion to appoint a best interest attorney and in determining that visitation in Nevada was in the minor child's best interest. For the reasons explained below, we shall affirm the circuit court's judgment.

ISSUES PRESENTED

Father presents two questions for our review:

I. Was the [trial] court correct in denying [Father's] motion to appoint a "best interest" attorney to represent the minor child?

II. Was the [trial] court correct by determining that it was in [the minor child's] best interest to grant visitation to [Mother] in Las Vegas?

As we explain below, we discern no error in either determination.

FACTUAL AND PROCEDURAL BACKGROUND

Father was granted physical and legal custody of the parties' daughter in 2013. Mother was granted limited visitation due to the circuit court's concerns about her "stability, lifestyle, and mental health issues." In May 2015, the court permitted Mother an expanded visitation schedule, including alternating weekends, a week in the summer, and certain holidays. The May 2015 order required Mother to provide quarterly updates on her therapy and prescription medication compliance and stated that if mother failed to keep up with the quarterly reporting "the court may set this matter in for a review of her access schedule."

In August 2015, Mother relocated to Las Vegas, Nevada. She did not comply with the requisite quarterly updates. In December 2015, the court altered Mother's visitation by giving Father authority to determine whether Mother's accommodations were fit for a young child, to require Mother to provide appropriate accommodations, and to restrict access to the minor child. The court otherwise left the 2015 visitation order unchanged.

In October 2017, Mother moved to modify visitation requesting that the court permit her to fly the minor child to Nevada, unaccompanied, for visitation there with Mother. The court ordered a home study of Mother's Nevada residence. Dr. Paglini, a licensed psychologist, performed the study. In brief, the court summarized Dr. Paglini's report as follows:

> Mr. John D. Paglini, Psy.D., conducted a home study for [Mother], wherein he conducted a visual inspection of [Mother's] residence, interviewed all individuals who resided in the home, conducted collateral interviews, and made additional contact with any people the evaluator deemed appropriate.
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> . . . Mr. John Paglini found no concerns with the home. Specifically, he found that the home is adequately clean, there are proper baby provisions, and both [Mother] and [her husband] are adequately stable. Mr. Paglini concluded that the court should not be concerned with any risk factors in relation to the home[.]
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> . . . Mr. Paglini conveyed concerns about [Mother's] consumption of marijuana and her psychiatric history, which she reported she presently suffers from depression and post-traumatic stress disorder[.]

The court noted that during the hearing on Mother's requested visitation, Mother had adamantly opposed attending counseling. The court denied Mother's request but concluded that

> if [Mother] was willing to attend psychotherapy to address her mental health issues, if she and [her husband] were willing not to smoke or consume

> marijuana 24 hours prior to and during [the minor child's] visit, and if [Mother] would fly to Maryland to accompany [the minor child] to and from Nevada until [the minor child] was older and was comfortable flying unaccompanied, the court would consider access with mother in Nevada. Until these conditions are met, the court will deny [Mother's] request to modify her access schedule as it pertains to Nevada visits.

In August 2018, Mother moved to modify visitation, requesting that the minor child visit her during the Christmas holiday. The circuit court denied the motion, finding that Mother had not met her burden to show a material change in circumstances. In late 2018, Mother began attending therapy at the Human Behavior Institute.

On August 17, 2020, Mother again moved to modify visitation. Father opposed the motion arguing that there was no material change in circumstances and Mother had yet to comply with the circuit court orders requiring quarterly updates. In May 2021, Father moved for the 2017 home study to be updated, and the court granted his motion. He also moved to appoint a best interest attorney to represent the minor child. The court denied that motion but permitted for reassessment at a later date.

Dr. Paglini interviewed Mother, Mother's husband, and Father, inspected Mother's Las Vegas residence, and interviewed the minor child over video. Dr. Paglini additionally reviewed Mother's prior psychological evaluations, some dating back to 2014, as well as Mother's treatment records from therapy sessions beginning in 2018. In July 2021, Dr. Paglini issued an updated home study. Dr. Paglini summarized Mother's treatment records for "mild to moderate mental health concerns" noting that "Mother appeared engaged in treatment and her therapist thought she made significant progress."

On August 27, 2021, the circuit court held a hearing on Mother's motion at which the parties testified. The 2021 home study was admitted into evidence as were Mother's treatment records. Mother testified that she attended therapy on a weekly basis for approximately one year, then bi-weekly for six months, then monthly until her provider discharged her from treatment. She testified that she felt she had made progress in therapy, that she currently felt positive, and that she had surrounded herself with positivity and support.

In September 2021, the circuit court granted Mother's motion to modify visitation, issuing an Opinion and Order. The court ordered that the minor child be permitted to fly to Las Vegas, with Mother accompanying her on the flights, twice per year for five-day stays on each occasion. The court, in its opinion, found that

> [Mother] has met her burden of showing a material change in circumstance. In October of 2017, the minor child was 6 years old. The minor child is now ten. At the time of the last Order, [Mother] adamantly refused to attend counseling. Since that time, [Mother] has undergone nearly two and a half years of counseling at [the Human Behavior Institute]. Moreover, at the time of the last hearing, [Mother] was demanding that the minor child fly as an unaccompanied minor and refused the Court's suggestion that [Mother] accompany the minor child on flights unless [Father] would agree to divide the costs. Today, however, [Mother] has reexamined her position and is offering to fly to and from Maryland to accompany the minor child on her visits to Nevada. Finally, while [Mother] has had a long history of personal, mental health, and other issues, she now appears to be in [a] more stable place in her life.

The court went on to consider the *Taylor* and *Sanders* factors, which guide a determination of whether visitation would be in the best interest of the child. As to the fitness of the parents, the court found that Mother is "currently stable and fit to have visitation with the minor child in Nevada, subject to certain conditions." As to the relationship established

between the child and each parent, the court found that Mother is not as close with the minor child as Father is, owing to the distance and lack of in person visitation during the COVID-19 pandemic, but the minor child nonetheless loves Mother and wanted in person visitation. As to the preference of the child, the court found that although the child's preference was for visitation in Maryland, she could be comfortable going to Nevada for a few days. The court noted findings from the 2021 home study that:

> [Mother] has completed therapy and made positive gains. [Mother] is who she is, and as noted, there are no known substantiated CPS investigations, she does not have a current criminal record, and although she is afflicted with mild mental health issues, she clearly has raised her children. . . . [I]t appears major risk factors are absent as [Mother] does not have a known CPS/DFS history, there are no known abuse or neglect, she is actively involved in treatment, and does not possess currently any significant substance abuse issues.

The court's order contained express instructions that Mother allow the minor child to stay in the third bedroom, provide photographs of the bedroom to Father ten days before the visit, ensure that Mother is not scheduled to work during the visit, secure or remove any medical marijuana and firearms, refrain from exposing the child to any pornographic material or exotic dancing, and permit daily telephone contact with Father.

Father moved to alter or amend the judgment. The circuit court denied the motion, and Father timely appealed.

DISCUSSION

Father first argues that the circuit court erred by denying his motion to appoint a best interest attorney to represent the minor child. He argues that the factors under Maryland Rule 9-205.1, some of which were "specifically identified" in Father's motion

and some of which were "reflected in the [trial] court docket," compel a different result. Father next argues that the circuit court erred by determining that it was in the minor child's best interest to visit Mother in Las Vegas. To this end, he again argues that the evidence compels a different result. He contends that the circuit court has failed to address its noted concerns from prior custody and visitation orders and failed to appreciate the risk of permitting visitation in Las Vegas. Father asks this Court to remand for the circuit court to appoint a best interest attorney and otherwise devise a more gradual approach to visitation.

Mother argues that Father's appeal from the circuit court's denial of his motion to appoint a best interest attorney was untimely as the notice of appeal was not filed within 30 days of the order. Mother alternatively argues the court did not abuse its discretion in declining to appoint a best interest attorney. Mother, likewise, takes the position that the court did not abuse its discretion in granting her motion for visitation because the 2021 home study provided adequate support for the circuit court's decision.

Appellate courts review decisions of the trial court on the law and evidence and "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and it will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Maryland Rule 8-131(c). "[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 v. Gerstman*, 245 Md. App. 168, 608 (2020) (internal quotation marks omitted). Child custody determinations are reviewed for an abuse of discretion, *Santo v. Santo*, 448 Md. 620, 625 (2016), as are decisions to appoint a best interest attorney for a minor child, *Garg v. Garg*, 393 Md. 225, 238 (2006). Abuse of discretion occurs when no

reasonable person would take the view of the trial court or when the ruling is "well removed from any center mark imagined by the reviewing court." *Santo*, 448 Md. at 626 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 313 (1997)). Here, we find no abuse of discretion in the circuit court's ruling on either motion.

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING FATHER'S MOTION TO APPOINT A BEST INTEREST ATTORNEY.

Initially, we must consider our jurisdiction to review the circuit court's denial of Father's motion to appoint a best interest attorney. Mother challenges the timeliness of Father's notice of appeal as to that order. We conclude that the order denying the motion to appoint a best interest attorney is reviewable along with the final judgment, the order modifying visitation.

"[A] party in the trial court must file a timely notice of appeal, from an appealable judgment, in order to confer upon an appellate court subject matter jurisdiction over that party's appeal." *In re Nicole B.*, 410 Md. 33, 62 (2009). "An appeal from a final judgment at the end of the case allows for review of all interlocutory orders previously entered in the case that have not been decided on the merits in a final interlocutory appeal." *Ruiz v. Kinoshita*, 239 Md. App. 395, 421 (2018) (quoting Judge Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues* 5 (3d ed. 2018)). To constitute a final judgment, a "ruling must be so final as either to determine and conclude the rights involved or to deny the appellant the means of further prosecuting or defending his or her rights and interests in the subject matter of the proceeding." *Id.* at 416.

The order declining to appoint a best interest attorney was an interlocutory order. *See Schuele v. Case Handyman and Remodeling Servs., LLC*, 412 Md. 555, 566 (2010) ("An order that is not a final judgment is an interlocutory order and ordinarily is not appealable."). The court's order granting Mother's petition for visitation determined the rights of the parties and concluded the proceedings. Father's timely appeal of that order, following the denial of his motion to alter or amend under Md. Rule 2-534, permits our review of the earlier entered interlocutory order. *Ruiz*, 239 Md. App. at 421.

Turning to the merits of Father's contentions, the circuit court did not abuse its discretion in denying the motion to appoint a best interest attorney. Family Law Article § 1-202(a) (2019 Repl. Vol.) authorizes the appointment of a best interest attorney in custody and visitation disputes. "'Child's Best Interest Attorney' means a lawyer appointed by a court for the purpose of protecting a child's best interest, without being bound by the child's directives or objectives." *McAllister v. McAllister*, 218 Md. App. 386, 403 (2014) (quoting *Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access* § 1.1). Maryland Rule 9-205.1(b) states: "In determining whether to appoint an attorney for a child, the court should consider the nature of the potential evidence to be presented, other available methods of obtaining information, including social service investigations and evaluations by mental health professionals, and available resources for payment."[1]

[1] Part (b) lists eleven factors for courts to consider where appointment may be most appropriate, including: request by one or both parties; the level of conflict; adult influence on the child; past or current mental health problems of a child or party; past or current abuse and neglect; special needs of the child; actual or threatened violence; substance

In denying the motion, the court implicitly found that a court-appointed attorney would not be necessary to assist with the sole issue before the court: expanding visitation. The significance of the potential visitation and the issues surrounding that visitation were well defined in the 2017 home study and the 2017 order denying Mother's petition for similar visitation. Mother's 2020 petition asserted that she had followed the courts earlier recommendations. Father's answer to the petition argued that the court's prior concerns had not been adequately addressed. Father's motion for a best interest attorney listed two reasons for the appointment: he believed there to be an "extremely high level of conflict" between the parties, and the minor child had been in counseling relating to her parents' divorce. The motion did not indicate how a best interest attorney would aid the presentation of evidence relevant to the visitation issue. It was reasonable for the court to conclude that the home study and evaluation of Mother would suffice for determining whether such visitation was in the child's best interest. *See Santo*, 448 Md. at 626.

II. THE CIRCUIT COURT DID NOT ABUSE DISCRETION IN CONCLUDING THAT VISITATION IN NEVADA IS IN THE MINOR CHILD'S BEST INTEREST.

Second, the circuit court did not abuse its discretion in granting Mother's petition to modify visitation. "Decisions as to child custody and visitation are governed by the best interests of the child." *Gordon v. Gordon*, 174 Md. App. 583, 636 (2007); *see Koshko v. Haining*, 398 Md. 404, 429 (2007) ("[V]isitation is a species of [child] custody[.]"). "When presented with a request for a change of, rather than an original determination of[] custody,

abuse; award of custody or visitation to a non-party; relocation substantially reducing time with a parent or sibling; and any other relevant factor. Md. Rule 9-205.1(b)(1)–(11).

courts employ a two-step analysis." *McMahon v. Piazze*, 162 Md. App. 588, 593–94 (2005). The court first asks whether there has been a material change in circumstances, and, if so, the court "then proceeds to consider the best interests of the child as if the proceeding were one for original custody." *McMahon*, 162 Md. App. at 594. Maryland courts have laid out guiding factors for the best interests of the child in *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977), and *Taylor v. Taylor*, 306 Md. 290 (1986).[2] "When considering the *Sanders*-*Taylor* factors, the trial court should examine 'the totality of the situation in the alternative environments' and avoid focusing on or

[2] The *Sanders*, 38 Md. App. at 420, factors are:

(1) the fitness of the parents;
(2) the character and reputation of the parties;
(3) the desire of the natural parents and agreements between the parties;
(4) potentiality of maintaining natural family relations;
(5) preference of the child;
(6) material opportunities affecting the future life of the child;
(7) age, health and sex of the child;
(8) residences of parents and opportunities for visitation;
(9) length of separation from the natural parents;
(10) prior voluntary abandonment or surrender.

The *Taylor*, 306 Md. at 304–11, factors are:

(1) capacity of the parents to communicate and reach shared decisions;
(2) the willingness of the parents to share custody;
(3) the fitness of the parents;
(4) the relationship established between the child and each parent;
(5) preference of the child;
(6) potential disruption of the child's social and school life;
(7) geographic proximity of parental homes;
(8) demands of parental employment;
(9) age and number of children;
(10) sincerity of parents' request;
(11) financial status of the parents;
(12) impact on state or federal assistance;
(13) benefit to parents.

weighing any single factor to the exclusion of all others." *Jose v. Jose*, 237 Md. App. 588, 600 (2018) (quoting *Best v. Best*, 93 Md. App. 644, 656 (1992)).

Here, the Opinion and Order enumerated its consideration of each of the *Taylor-Sanders* factors. The court credited Mother's evidence that she had attended therapy since 2018 as well as the findings of the home study that Mother had successfully cared for her other minor children and provided a safe and suitable home. The court implemented Dr. Paglini's recommendations and imposed some of its own, including limiting the visit to five days, requiring that Mother provide photographs of the child's bedroom to Father ten days in advance, fly to accompany the minor child, abstain from marijuana and alcohol use prior to the visit, secure or remove all medical marijuana and firearms in the home, prepare the third bedroom for the minor child, take off from work during her visit, and prohibit the child from seeing pornographic material.

Father does not argue that the trial court erred in consideration of any particular *Taylor-Sanders* factor nor does he argue that the court omitted analysis of any factor. Rather, he suggests that the weight of the evidence indicates that visitation in Nevada is not in the best interests of the child. Father refers to Mother's mental health issues in 2013 (and prior) that contributed to Father's sole custody, Mother's October 2017 opposition to therapy, Mother's admission during the August 2021 hearing that she attends therapy only to facilitate visitation, Mother's failure to provide quarterly updates per the 2015 visitation order, the minor child's stated preference for visitation in Maryland, Mother's prior work in adult entertainment, and Mother's history with marijuana. However, these are all facts that were available for the court to consider and his argument fails to demonstrate how the

trial court's conclusion was unsupported by the evidence or was otherwise erroneous. *See Gizzo*, 245 Md. App. at 206 (holding that an argument that a fact-finder might have reached a different conclusion from the evidence "fail[ed] to show that any of the trial court's findings were unsupported by sufficient evidence or that the court's reasoning was irrational").

The overall thrust of Father's argument is that the circuit court erred in concluding that Mother was mentally fit for visitation and in disregarding the preference of the child. The court previously addressed Mother's failure to provide quarterly reporting when it modified her Maryland visitation in December 2015. The records from Mother's therapy indicated, as discussed in Dr. Paglini's findings, that Mother appeared engaged in treatment, that Mother's treatment was beneficial, that the intensity of her symptoms had lessened, and that Mother had been appropriately discharged from therapy. The evidence before the court provided adequate foundation for its conclusion that Mother was fit for visitation. *C.f. Gillespie v. Gillespie*, 206 Md. App. 146, 175 (2012) (holding that deterioration of a parent's mental health supported the finding that reducing custodial time would be in children's best interests). We also note that Mother agreed that she would abide by the conditions in the home study, including that she would secure her medical marijuana and firearms and abstain from marijuana usage while visiting with the minor child. Although the child expressed a preference for visitation in Maryland, the court noted that the child's concern stemmed from Nevada being a "new place" that the child might not "feel comfortable visiting for more than a week." *See In re Barry E.*, 107 Md. App. 206, 220–21 (1995) (explaining that the trial court is not bound by the child's preference); *Jose*,

237 Md. App. at 600 (noting no one factor controls the best interest analysis). The court's findings of fact were not clearly erroneous, and its ruling was not removed from any imagined center mark. *See Santo*, 448 Md. at 626.

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