UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1523 and 2254

September Term, 2014

CONSOLIDATED CASES

RACHEL ROSENTHAL STRISIK

v.

MARSHALL PHILIP STRISIK

Zarnoch,
Hotten,
Reed,

JJ.

Opinion by Hotten, J.

Filed: June 22, 2015

This appeal arises from a complaint for limited divorce and related relief filed by appellant, Rachel Rosenthal Strisik, against appellee, Marshall Philip Strisik, in the Circuit Court for Montgomery County. Following a five day hearing, the court granted joint legal custody with tie-breaking authority to appellant, primary physical custody to appellant with unsupervised visitation for appellee, and restrictions on appellee relative to monitoring his alcohol consumption. Additionally, the court scheduled a review hearing in 90 days. Appellant filed an interlocutory appeal of the court's order. Subsequently, the review hearing was held and the court concluded that certain restrictions were no longer necessary for appellee's visitation arrangement with the minor children. Appellant noted a timely appeal, which was consolidated with the interlocutory appeal and presents four questions for our consideration, which we have consolidated and rephrased for clarity[1]:

[1] Appellant's original questions presented for appeal stated:

I. Whether the trial court erred in denying [a]ppellant's request for supervised custodial access despite overwhelming evidence of [a]ppellee's alcoholism, and abusive conduct.

II. Whether the trial court erred by imposing inadequate restrictions to monitor [a]ppellee's drinking despite overwhelming evidence of [a]ppellee's alcoholism and expert opinions supporting such restrictions.

III. Whether the trial court erred in denying [a]ppellant's request for sole legal custody despite overwhelming evidence of the parties' inability to communicate and reach decisions in the best interests of their children.

(continued . . .)

(. . . continued)

I. Whether the circuit court erred in denying appellant's request for supervised custodial access and request for sole legal custody?

II. Whether the circuit court erred by modifying its final order?

For the foregoing reasons, we shall affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

The parties were married on August 13, 2006 in Carlsbad, California. Their twin daughters, Ellie Isabel and Marin Ava, were born on January 18, 2008. The minor children currently reside in Bethesda, Maryland with appellant and appellant's parents. Appellant holds a Juris Doctorate degree and owns a professional organizer business. Appellee is employed as an attorney at MedStar Health and teaches a graduate health law class in Washington, D.C.

During the course of their marriage, the parties separated briefly in 2008, 2010, and 2012, but reconciled each time. Additionally, they attended marital counseling with Dr. Anita Gadhia-Smith ("Dr. Smith") for appellee's alcoholism, extended family issues, finances, and several other issues. In the summer of 2008, appellee participated in outpatient treatment through Kolmac for his alcoholism and attended Alcoholics Anonymous ("AA").

In early 2009, appellee attended a 28 day inpatient treatment program at Father Martin's Ashley in Harford County, Maryland. Thereafter, appellee enrolled in a treatment

IV. Whether the trial court erred by modifying its August 18, 2014 Final Order absent adequate pleading and proof of a material change in circumstances.

program called the Executive Addictive Disease Program ("EADP") to assist him with his alcoholism.

Appellant testified that were several incidents in which appellee became physical with her while under the influence of alcohol. On November 8, 2013, appellant moved out of the marital home with the children while appellee was at work. She moved in with her parents and testified that she was fearful for her safety and how the appellee would react. The parties continued to participate in joint therapy with Dr. Smith.

Appellee visited the minor children for the first few weeks in November 2013. On November 8, 2013, appellant filed a complaint in the Circuit Court for Montgomery County for limited divorce relief that included sole legal and physical custody of the minor children. On November 26, 2013, the parties entered into a handwritten interim agreement, which allowed visitation, including overnight visits, predicated on appellee's sobriety.

Appellee filed an answer and counterclaim on December 9, 2013 and sought joint legal and physical custody of the minor children. Thereafter appellant filed an answer to appellee's counterclaim opposing the relief that appellee sought. On or about December 23, 2013, the parties entered into a second interim agreement, which discussed therapy for the children, the appointment of a Best Interest Attorney ("BIA"), the appointment of a forensic custody evaluator, a limited schedule of access for appellee to include a weekly overnight, child support, and health insurance coverage.

The parties jointly motioned for the appointment of a private forensic custody evaluator on January 6, 2014. The court granted the motion on February 4, 2014, and Dr.

Katherine Killeen was appointed. Additionally, the parties jointly motioned for the appointment of a BIA and the court appointed Stephanie Fink.

On March 31, 2014, a *Pendente Lite* hearing was held and the parties agreed to a temporary custody schedule. The order allowed appellee to have two overnight visits per week and included a temporary holiday and vacation schedule.

On May 14, 2014, the BIA insisted that appellee use a remote portable breathalyzer machine until trial and that a positive or missed remote test would require appellee to wear a SCRAM alcohol detecting bracelet,[2] continued use of an Interlock[3] system in his car, random testing and AA attendance. This was in response to a private investigator allegedly observing appellee consume alcohol with his girlfriend and avoid a random urine test for drugs and alcohol requested by the BIA.

A merits hearing on the issues of legal and physical custody was held from July 21-24, 2014, but not completed. The court entered a temporary visitation order which would be in effect until the trial concluded. The trial resumed on August 6, 2014. On August 7, 2014, the court ordered, by oral ruling, joint legal custody with tie-breaking authority to appellant, unsupervised visitation for appellee on weekly Tuesday overnights and alternating weekends and certain restrictions on appellee to monitor his consumption

[2] The SCRAM bracelet detects and reports alcohol consumption daily.

[3] The Interlock prevents the engine of the car from starting until the driver provides a breath alcohol test sample. The vehicle will not start if it detects a breath sample with any amount of alcohol.

of alcohol. The custody order filed on August 18, 2014 reflected these rulings. Appellant noted an appeal of this order on September 16, 2014.

A review hearing was held on November 13, 2014. The final order indicated, in pertinent part:

> THAT, the [c]ourt's August 18, 2014 Order clearly contemplated further discussion as to holidays and vacation access, which the parties have now resolved by virtue of agreement and Consent Order filed contemporaneously with the instant ORDER, and
>
> THAT, the [c]ourt concludes that certain restrict provisions in this [c]ourt's August 18, 2014 Order are no longer necessary to ensure a safe and stable visitation arrangement between [appellee] and minor children; and
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> THAT, the [c]ourt has received insufficient evidence, either at the merits hearing, or in the instant hearing, to establish a nexus between [appellee's] history of alcohol consumption and the children's fundamental welfare; and
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> THEREFORE, it is this 2nd day of December, 2014 by the Circuit Court for Montgomery County, Maryland hereby
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> * * *
>
> ORDERED, that the [appellee] may discontinue participation in the remote alcohol monitoring program, as well as the ignition interlock program; and it further
>
> ORDERED, that the [appellee's] abstinence from alcohol, participation with Alcoholics Anonymous and contact with his sponsor are no longer required by this Order, but shall be self-directed[.]

Appellant noted a timely appeal, which was consolidated with the earlier appeal. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

Appellate review of a circuit court's custody determination is limited. The circuit court is in the best position to evaluate the facts of the case and assess the credibility of witnesses. *Boswell v. Boswell*, 352 Md. 204, 223 (1998). Therefore, custody and visitation determinations are within the sound discretion of the circuit court. *Id.* The Court of Appeals explained in *Davis v. Davis*, 280 Md. 119 (1977), that "when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion." *Id.* at 126. "In applying the best interests of the child standard to a custody award or grant of visitation, a court is to consider the factors stated . . . and then make findings of fact in the record stating the particular reasons for its decision." *Boswell*, 352 Md. at 223. Furthermore, when evaluating proposed visitation restrictions, the Court of Appeals explained:

> In all family law disputes involving children, the best interests of the child standard is always the starting—and ending—point. We see no reason to deviate from this standard here. When we narrow the focus to proceedings involving proposed visitation restrictions in the presence of non-marital partners, courts also are to examine whether the child's health and welfare is being harmed. Once a finding of adverse impact on the child is made, the trial court must then find a nexus between the child's emotional and/or physical harm and the contact with the non-marital partner. If no clear, direct connection is found, then the non-custodial parent's visitation rights cannot be restricted.

Id. at 236-37.

The Court of Appeals elaborated on the standards of review for a visitation or custody order, indicating:

> Thus, if the trial court does not make the appropriate factual findings based on evidence presented, or relies on one factor to the exclusion of all others, then its visitation or custody order may be challenged. In such cases, the appellate court conducts three separate tiers of review. First, when the appellate court examines factual findings, the clearly erroneous standard of Maryland Rule 8–131(c) is applied:
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> > *Action tried without a jury.* When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.
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> Second, if errors were made as to matters of law, additional proceedings in the trial court will usually be required unless the error is found to be harmless. Finally, when the reviewing court concludes that the factual findings of the trial court are not clearly erroneous and that sound principles of law were applied, the trial court's decision will not be disturbed unless there has been a clear abuse of discretion. In almost every case, the chancellor's decision regarding custody and visitation is given great deference unless it is arbitrary or clearly wrong.

Id. at 224-25 (internal quotations and citations omitted).

DISCUSSION

I.

Appellant contends that the circuit court erred in denying appellant's request for supervised custodial access because there was overwhelming evidence of appellee's abuse and alcoholism which jeopardized the well-being of the minor children. Upon reviewing a child custody determination, we emphasize that "[o]verarching all of the contentions in disputes concerning custody or visitation is the best interest of the child[ren]." *Wagner v. Wagner*, 109 Md. App. 1, 11 (1996) (quoting *Hixon v. Buchberger*, 306 Md. 72, 83 (1986)). The Court of Appeals has described the best interests of the child standard as being "of

transcendent importance and the sole question in familial disputes; indeed, it is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak." *Boswell*, 352 Md. at 219 (internal quotations and citations omitted).

Regarding visitation, "the non-custodial parent has a right to liberal visitation with his or her child 'at reasonable times and under reasonable conditions,' but that right is not absolute." *Id.* at 220 (quoting *Myers v. Butler*, 10 Md. App. 315, 317 (1970)). The access to the children must be reasonable and any limitations regarding visitation must also be reasonable. *Boswell*, 352 Md. at 220 (citation omitted). "In examining the reasonableness of a visitation restriction, courts will look to see if the child is endangered by spending time with the parent: 'Visitation rights, however, are not to be denied even to an errant parent unless the best interests of the child would be endangered by such contact.'" *Id.* (quoting *Roberts v. Roberts,* 35 Md. App. 497, 507 (1977)). "Visitation should only be denied in cases of abuse, neglect or harm to the child, as evidenced by a specific showing of detriment." *Boswell*, 352 Md. at 236.

In *Hild v. Hild*, 221 Md. 349 (1960), the Court of Appeals explained:

> For the purpose of ascertaining what is likely to be in the best interests and welfare of a child a court may properly consider, among other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex, and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child. It stands to reason that the fitness of a person to have custody is of vital importance. . . .

Id. at 357 (internal citation omitted). In making its ruling, the circuit court is not allowed to consider one factor to the exclusion of the others. *See Boswell*, 325 Md. at 224. The

factors considered in determining the custody of a minor child include, but are not limited to: "[c]apacity of the [p]arents to [c]ommunicate and to [r]each [s]hared [d]ecisions [a]ffecting the [c]hild's [w]elfare"; "[w]illingness of [p]arents to [s]hare [c]ustody"; "[f]itness of [p]arents"; "[r]elationship [e]stablished [b]etween the [c]hild and [e]ach [p]arent"; "[p]reference of the [c]hild"; "[p]otential disruption of [c]hild's [s]ocial and [s]chool life"; "[g]eographic [p]roximity of [p]arental [h]omes"; "[d]emands of [p]arental [e]mployment"; "[a]ge and [n]umber of [c]hildren"; "[s]incerity of [p]arents' [r]equest"; "[f]inancial [s]tatus of the [p]arents"; "[i]mpact on [s]tate or [f]ederal [a]ssistance"; and "[b]enefit to [p]arents." *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986)

In the case at bar, the circuit court addressed the factors before rendering its decision. It discussed the communication between the parties and noted that the e-mails it reviewed were respectful in their wording, tone, and with their requests. In making its determination the court emphasized the importance of the best interests of the child standard, indicating:

> Before I go[] into the factors and the particular facts of this case, I want to reiterate what is most important and most central to my consideration, and it is of course what is in the best interests of these children. These children, and all children in these custody situations, are entitled to both parents, not just to visit one or the other, but as a real parenting figure with authority and the respect that goes along with being a parent, so long as each parent is fit and proper and deserving of the type of parenting respect and authority that I have just described.

Additionally, the court reviewed the *Taylor* factors and discussed its observations of the witnesses and evidence, stating:

> So after hearing all of this testimony, and certainly the arguments taken from the testimony, it seems to me that a lot of people, counsel, and including Dr. Killeen, they're angry with the [appellee] because of the way

> he handled the alcohol issue in this case. And it was frustrating. There's no doubt about it, that it was frustrating.
>
> But there in fact needs to be a nexus between that frustration, that behavior, and actual parenting. And that includes decision-making. The alcohol issue has really consumed this case. It is important, and it needs to be dealt with, and I will put orders in place to try to meet the need for something. But we need to keep our eye on what is in the best interest of the children.
>
> If he is relegated to a status of weekend dad, with no decision-making, he will in fact be marginalized, absolutely, without a doubt, he will be marginalized. If he had not been a good parent for the life of these children to date, 6 and a half years, or if he had such issues that would make him a clear and present danger to these children, then perhaps that is a status that he would be relegated to. But that's not the evidence. The evidence is that he is a good, loving, caring parent. And I can see no reason, based on the entirety of this evidence, to marginalize, let alone demonize him in this case.

Appellant relies heavily on appellee's alcoholism to support her contention that the circuit court erred in imposing inadequate restrictions to monitor appellee's drinking. We disagree. The circuit court's main focus was the best interests of the children. In discussing appellee's monitoring, the court explained:

> At the same time as that, he submitted to ignition interlock in May and thereafter, participated in the remote SCRAM type of monitoring, urines, urine monitoring. So this, someone described it as a boulder in the case. Someone else described it as sucking all of the air out of the case. It became huge in this case. And I fear that there were times when other issues were lost. And there were times I thought that the issue of what's in the best interest of the children might be getting lost.
>
> The [appellee's] struggle with alcohol, and it was very difficult, particularly in 2008 and 2009, coupled with his willingness to be monitored as comprehensively as he was, I don't think I've ever seen that in any case, any custody case, where somebody has submitted to that type of monitoring pre-trial. . . .

We perceive no error or abuse of discretion. The court addressed the factors before determining that appellant would have primarily physical custody. Additionally, the court ordered that appellee abstain from alcohol completely and continue with the interlock and scram until the review hearing. The circuit court was in the best position to observe all of the evidence and testimony presented and we will not substitute our judgment. Accordingly, we affirm.

II.

Appellant contends that the circuit court erred when it modified its final order and scheduled for a review hearing for undefined reasons. Additionally, appellant avers that neither party petitioned the court for post-trial relief and therefore, the court "exceeded its authority by retaining jurisdiction over a resolved matter under appeal with no properly pled facts put before it to justify the modification of the August 18, 2014 order." Appellant cites to *Frase v. Barnhart*, 379 Md. 100 (2003), to support her contention of the court's impermissible exercise of judicial authority. She specifically cites to the Court of Appeals stating:

> The court's role is different in a normal private custody dispute. It is to take evidence and decide the dispute, so that the child and the other parties can get on with their lives. The court does not retain jurisdiction until the child turns 21, or even 18. Although the matter of custody, visitation, and support may always be reopened upon a showing of changed circumstances, the court's jurisdiction over the particular dispute ends when the dispute is resolved, which the law anticipates will occur within a reasonable time after the evidentiary hearing. Those kinds of cases are not to be strung out indefinitely, as though they were CINA cases.
>
> For good cause, the court may hold a case open for a reasonable period to consider additional evidence, not available at trial but which the court finds necessary to a proper decision. What it may not do, however, is to proceed

> to make findings that would dictate a particular result and then subject the favored party to conditions inconsistent with that result and to continuing review hearings. When it does that, the case never ends; the child and the parties remain under a cloud of uncertainty, unable to make permanent plans. The court seemingly reserves the power to alter the custody arrangement at any time, even in the absence of a new or amended petition, based on a later review of circumstances known or predicted to exist at the time of the initial determination. That is procedurally impermissible.

Id. at 121.

The Court of Appeals explained the jurisdiction of Maryland courts regarding child custody cases in *Ross v. Hoffman*, 280 Md. 172 (1977), indicating:

> In Maryland, resolving child custody questions is a function of the equity courts. The jurisdiction of a court of equity includes the custody, maintenance, visitation and support of a child. The court may direct who shall have the custody of a child, decide who shall be charged with its support and maintenance, and determine who shall have visitation rights. This jurisdiction is a continuing one, and the court may from time to time set aside or modify its decree or order concerning the child.
>
> In exercising its jurisdiction over the custody of a child, the equity court performs two different but related functions: child protection and private-dispute settlement. Child custody disputes fall into two categories with respect to those seeking custody: disputes between the biological parents and disputes between a biological parent and a third party, often a relative but not infrequently a foster parent, consanguineously unrelated to the child. In performing its child protection function and its private-dispute settlement function the court is governed by what is in the best interests of the particular child and most conducive to his welfare. This best interest standard is firmly entrenched in Maryland and is deemed to be of transcendent importance.

Id. at 174-75 (internal citations and footnote omitted). Thus, "[b]ecause the court retains continuing jurisdiction over the custody of minor children, no award of custody or visitation, even when incorporated into a judgment, is entirely beyond modification, and such an award therefore never achieves quite the degree of finality that accompanies other

kinds of judgments." *Frase*, 379 Md. at 112. Furthermore, "[w]hile custody decrees are never final in Maryland, any reconsideration of a decree should emphasize changes in circumstances which have occurred subsequent to the last court hearing." *Hardisty v. Salerno,* 255 Md. 436, 439 (1969).

We disagree with appellant's contentions. As noted in the above, courts may hold a case open for good cause and consider additional evidence. In the case at bar, the circuit court did not hold the case open for an unreasonable amount of time but set a review hearing within 90 days. At the custody hearing, the court indicated:

> I'll set up a court review in 90 days. It's not my intention to treat this case as subject to review over and over again. But I think because of the precise issues that we have, I think that that will benefit everybody.
>
> The [appellee] will stay with the interlock until I see him next. Apparently he's already signed up for that, for the next three months. And he can only use his car to transport, certainly to transport the children.
>
> I have already ordered that he must abstain from alcohol altogether, so perhaps it's superfluous to say that he absolutely cannot drink anywhere near or around the children, nor can he drink and drive. I guess that's a subset of totally abstaining from alcohol until I see him next.

The court indicated in its ruling and order that it scheduled a review hearing at the request of the BIA to assess the appellee's compliance with the court orders regarding visitation. Additionally, the court did not discuss vacation and holidays in the August order. Before making its ruling, the court explained:

> There has been no evidence whatsoever in this case, not during the entire full hearing, nor since then, that leads me to any conclusion that the girls are at any risk. Mr. Strisik is not perfect, and neither is Ms. Strisik. And neither are any of the rest of us in this room. But there just has not been any nexus ever established that they are at risk.

In making its ruling at the review hearing the court stated:

> All right. So we have, as I mentioned earlier, have had a review hearing today, and it was my intention and I think it was clear from our full hearing in August, that there were certain matters that would be taken up at this review.
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> And as I recall the review was in fact, contemplated or requested by certainly the BIA and not in any way objected to by anybody else. And clearly it was my intention at this review hearing to address the issue, the alcohol issue that was discussed during the full hearing. And so I had asked the BIA to be the recipient of certain documents that, the SCRAM, the breath results and also the LifeSaver, which is actually the driving record.
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> And so I am now in receipt of those records, as also I am in receipt of various AA slips of Mr. Strisik, and also an affidavit of the sponsor in this case. And I also have heard testimony, well not testimony, I have heard proffers and arguments, suggestions and comments from Mr. Strisik, who is now here pro se and then from counsel for Mrs. Strisik and also the BIA.
>
> And it was certainly my intention and remains my intention to make a decision as to whether certain of my orders in the August comprehensive order should continue. As I said earlier, there would be little reason to have this review to review these facts, and then ignore them, one way or another. So I will amend this order to a certain extent, and in no way trying to undercut anybody's rights on appeal or otherwise. So I will delete the requirement that Mr. Strisik continue with the remote alcohol monitoring device. I will also delete the requirement that he maintain the interlock device on the car.

The circuit court anticipated a change in circumstances regarding appellee's monitoring devices. At the initial hearing, the court ordered that appellee be monitored until the review hearing. Based on the evidence presented, the court concluded that the girls were not at any risk and still came to that conclusion at the review hearing. Appellant has not cited authority which demonstrates that the circuit court exceeded its authority and we perceive no error. Accordingly, we shall affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY

COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.