

Circuit Court for St. Mary's County
Case No.: 18C12000361

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1661

September Term, 2017

JAMES REDMAN

v.

TRACY L. FLORA

Arthur,
Nazarian,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: October 22, 2018

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

This is the second appeal from an order of the Circuit Court for St. Mary's County modifying the terms of a consent order, which reduced appellant's visitation with his minor child (the "Child"). In this appeal, appellant challenges the trial court's decision reinstating its previous order as an abuse of discretion, arguing that the order is inapposite to the court's findings of fact.

Appellant presents two questions for our consideration:

- 1) Whether the court abused its discretion by reinstating the May 6, 2016, order that modified the original consent order in direct contravention of the court's written findings of fact.
- 2) Whether the court abused its discretion by failing to comply with this [C]ourt's instructions on remand.

For the following reasons, we vacate the decision of the circuit court.

BACKGROUND

The parties James Redman ("Appellant") and Tracy Flora ("Appellee") are the father and mother of the Child. In July 2012, during a proceeding before a family law master in the Circuit Court for St. Mary's County, the court entered a consent order regarding custody of the Child, who was then two years old. The July 2012 Order provided that:

- (1) Parents have joint legal custody.
- (2) Ms. Flora has primary residential custody.
- (3) Ms. Flora has final decision-making authority through a tie-breaker provision in the event the parties reach an impasse regarding the Child.
- (4) Mr. Redman has access to the Child on alternating weekends from Friday at 5:00 p.m. until Monday at 5:00 p.m. and on every Wednesday from 5:00 p.m. until Thursday at 5:00 p.m.

- (5) On the alternating weeks Mr. Redman does not have the Child, he may have the Child for a “date night” from 5:00 p.m. to 8:00 p.m.
- (6) Mr. Redman would have the Child during every Spring Break and during three non-consecutive weeks each summer. Ms. Flora would have the Child during two non-consecutive weeks each summer.

In April 2015, when the Child was approximately five years old, Mr. Redman filed a motion for modification of legal and physical custody, in which he asked the court for an increase in visitation with the Child. Mr. Redman contended the parties previously agreed that the consent order was appropriate because of the Child’s young age and he believed it was in the Child’s best interest to spend more time with the mother. He was further informed by his counsel and the family law magistrate that he could request to modify the order when the Child was older.

Ms. Flora filed an answer asking the court to dismiss the motion for modification. In addition, she filed a counter-complaint requesting primary physical custody and sole legal custody of the Child. In October 2015, the court held a hearing on the matter where the court heard testimony from both parties and witnesses.

Pursuant to the hearing, the court issued its opinion and order on February 16, 2016, which modified the terms of the July 2012 Order. The February 2016 Order was based on the following findings: (1) that there was a material change of circumstances in the parties’ situation that warrants a change of the July 2012 Order; (2) that it is in the best interest of the Child to award Ms. Flora and Mr. Redman joint legal custody; (3) that it is in best interest of the Child to award Ms. Flora primary physical custody, subject to the reasonable and liberal visitation of Mr. Redman; (4) that it is in the best interest of the Child that Mr.

Redman be awarded an increased amount of parental access; and (5) that Mr. Redman is a fit and proper person to have such access.

The February 2016 Order provided that:

- (1) The parties have joint legal custody without tie-breaking authority.
- (2) Ms. Flora retains primary residential custody of the Child.
- (3) Mr. Redman has access to the Child on alternating weekends commencing on Thursday after school and ending Monday morning when the Child is returned to school.
- (4) Mr. Redman will no longer have mid-week visitation and alternating date nights from 5:00 p.m. to 8:00 p.m.
- (5) Mr. Redman will no longer have spring break visitation.
- (6) Both Mr. Redman and Ms. Flora will have the Child during one week each summer.

Subsequently, Mr. Redman filed a motion for reconsideration on the grounds that, although the court's findings indicated he should have increased time with the Child, the February order reduced his time with the Child by eliminating mid-week, spring break, and two weeks of summer visitation. Ms. Flora opposed the motion for reconsideration. On May 6, 2016, the court issued a revised order that granted him one additional week in the summer. The court's revisions regarding visitation are illustrated in the following chart:

	CONSENT ORDER July 10, 2012 ¹	MODIFIED ORDER Feb 12, 2016 ²	MODIFIED ORDER May 6, 2016 ³
Legal Custody	Parents have joint legal custody	Not modified	Not modified
Residential Custody	Ms. Flora has primary residential custody	Not modified	Not modified
Tie-Breaking Provision	Ms. Flora has final decision-making ability in the event the parties reach an impasse regarding the Child	No tie-breaking provision	Not modified
Visitation During School Year	Mr. Redman’s Access to the Child: 1. Alternating weekends from Friday at 5:00 p.m. to Monday at 5:00 p.m. 2. Every Wednesday from 5:00 p.m. until Thursday at 5:00 p.m. 3. 5:00 p.m. to 8:00 p.m. “date night” on the alternating weeks Mr. Redman does not have the Child 4. Every Spring Break from the Friday at 5:00 p.m. when school ends for spring break until the Friday before Easter at 5:00 p.m.	Mr. Redman’s Access to the Child: 1. Alternating weekends commencing on Thursday after school and ending Monday morning when the child is returned to school. 2. No mid-week visitation (including Wednesday and date nights) 3. No Spring Break visitation	Not modified
Summer	Mr. Redman has three non-consecutive weeks each summer Ms. Flora has two non-consecutive weeks each summer	Each parent has one week	Mr. Redman has two weeks Ms. Flora has one week
Holidays	As agreed upon by parties	Federal holidays falling on a Monday are controlled by the weekend visitation schedule, with the additional Monday added; all other federal holidays alternate between parents	Not modified

¹ Following the July 10, 2012, Order, Mr. Redman had a total of approximately 158 nights/days of visitation (not including variable holidays).

² After the order was modified on February 12, 2016, Mr. Redman’s visitation totaled approximately 111 nights/days of visitation (not including variable holidays).

³ After the May 6, 2016, modification which added one extra week of summer visitation, Mr. Redman’s visitation totaled approximately 118 nights/days of visitation (not including variable holidays).

Mr. Redman appealed the trial court’s May 2016 Order and this Court vacated the custody provisions of the court’s order. We remanded the case and asked the court to explain its reasoning for the reduced visitation.

On August 22, 2017, the court held a hearing and issued an order and opinion holding the May 2016 Order shall remain in effect. The court found that it “reflects the best interest of the Child” to reinstate the order.

This appeal followed.

STANDARD OF REVIEW

In child custody cases, “we will not set aside factual findings made by the chancellor 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 chancellor abused his discretion.” *McCready v. McCready*, 323 Md. 476, 484 (1991). This standard of review accounts for the trial court’s unique “opportunity to observe the demeanor and the credibility of the parties and the witnesses.” *Petrini v. Petrini*, 336 Md. 453, 470 (1994). We will not reverse simply because we would not have made the same ruling. *North v. North*, 102 Md. App. 1, 14, 648 (1994).

An abuse of discretion occurs when “no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles.” *Id.* at 13 (internal citations and quotations omitted). Such an abuse may also occur when the court’s ruling is “clearly against the logic and effect of facts and inferences

before the court, or the decision is well removed from any center mark imagined by the reviewing court.” *Id.* at 14 (internal citations and quotations omitted).

DISCUSSION

Mr. Redman argues, following this Court’s remand, the trial court abused its discretion by reinstating its May 2016 Order because the order was contrary to its prior findings of fact. According to Mr. Redman, the court found “because the minor child was two years of age at the time of the original consent order and was five years old when the new hearing was conducted, it was in the [Child’s] best interest to spend increased parenting time with Appellant” and “such a shift in the best interest of the child constituted a material change that warranted a modification.” Further, Mr. Redman argues “by stating in its written findings that a material change existed (i.e. the minor child growing older) also satisfied the second step of the analysis.” Conversely, Ms. Flora argues the court did not make such a finding.

In determining whether a modification of custody is warranted, the court employs a two-step analysis: first, the court examines whether a material change of circumstances exists. *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). A material change of circumstances is one that may affect the welfare of the child. *Id.* If none is found the court's inquiry ceases. *Id.* Second, if a material change of circumstances is found, the court considers the best interest of the child as if the proceeding were an original custody proceeding. *Id.*

In the present case, the court followed this analysis, finding in its February 2016 Order “there [was] a material change of circumstances in the party’s situation that warrants

a change of the consent order executed July 10th, 2012.” The court then proceeded to examine what was in the best interest of the Child, including in its determination a review of the following factors:

the ability of the parties to communicate, the fitness of the parties, character and reputation of the parties; desire of the natural parents and agreements between the parties; potentiality of maintaining natural family relations; preference of the child; material opportunities affecting the future of the child, age, health and sex of the child; residences of parents and opportunity for visitation; length of separation from the natural parents; and prior voluntary abandonment or surrender and abuse.

At issue is whether the court abused its discretion on remand in reinstating the May 2016 Order when it made factual findings that Mr. Redman be awarded an increased amount of parental access.

This Court in remanding, stated:

We recognize that there may be reasons why it would have been appropriate for the court to significantly reduce the amount of access between Mr. Redman and the Child even though it would otherwise be in the Child’s best interest to increase the amount of access. But those reasons, if they exist, are not clear from the court’s orders and we are unwilling to speculate as to what the court’s reasoning might have been.

We will vacate the custody provisions of the court’s February 12, 2016 and May 6, 2016 [O]rders and remand this case to the circuit court for the court to explain its reasoning.

Following this Court’s mandate, the trial court held a hearing and subsequently issued its opinion stating:

‘Unfortunately, there is no litmus paper test that provides a quick and relatively easy answer to custody matters.’ The [c]ourt does not seek to diminish Mr. Redman’s right to visitation or impede in any way upon the forging of a bond and shared memories between parent and child. However,

the [c]ourt must balance this parental right against the overriding concern for the best interest of the child. At present, the child is approximately 7 years old and currently attending school. Accordingly, the custody order must reflect the current circumstances and carefully navigate how best to maintain the welfare of the child.

The February 16, 2016 Order sought to serve the needs of the child by eliminating mid-week overnight visitation on alternating weeks as it was disrupting the child's routine and ability to prepare for school the following morning. However, seeking to compensate for the loss of mid-week overnight visitation, the [c]ourt ordered that alternating weekend visitation begin on Thursday rather than Friday. Additionally, the modified order allowed Mr. Redman more certainty with holiday visitation and a larger voice in decision making for the child by eliminating the tie-breaking provision.

The May 16, 2016 Order also reflected the [c]ourt's finding that it was in the best interest of the child to spend more time with Mr. Redman when it granted him an extra week of summer visitation. In total, setting aside holidays, Mr. Redman only lost approximately 14 overnight visits. The remaining 26 days calculated by the Court of Special Appeals as lost overnight visits were actually the elimination of 26 'date nights' which gave Mr. Redman visitation on alternating weeks from 5pm-8pm. As previously discussed, these date nights would be disruptive to the child during the school week and were eliminated to provide a more structured and stable schedule. Thus, given the changed circumstances which resulted in the modification of the custody order, this arrangement is reasonable and reflects the best interest of the child.

At oral argument in this case, Ms. Flora's counsel conceded that the court incorrectly calculated the number of overnight visits Mr. Redman lost. While the court stated, "Mr. Redman only lost approximately 14 overnight visits," this was a miscalculation and is the result of the court's finding that Mr. Redman had "mid-week overnight visitation on alternating weeks," resulting in a total of 26 midweek overnight visits. However, Mr. Redman had a total of 52 midweek overnight visits as the court's original July 2012 Order awarded Mr. Redman visitation "every Wednesday from 5:00 p.m. until Thursday at 5:00

p.m.,” resulting in a difference of 26 midweek overnight visits. Thus, the court’s explanation for reinstating its May 2016 Order is premised on a mathematical error.

The court incorrectly concluded that the loss of 26 midweek overnight visits “were actually the elimination of 26 ‘date nights.’” In relying on this error, the court failed to consider that removing overnight visitation on every Wednesday and replacing it with alternating weekends commencing on Thursday, reduces Mr. Redman’s visitation by a total of approximately 40 overnight visits.⁴ This reduction in visitation is not consistent with the court’s finding “it is in the minor child’s best interest that the father be awarded an increased amount of parental access.”

We therefore vacate and are compelled to remand for further proceedings consistent with this opinion.

**JUDGMENTS OF THE CIRCUIT COURT
FOR ST. MARY’S COUNTY IS VACATED
AND REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION; COSTS TO BE PAID BY
APPELLEE.**

⁴ This figure includes the additional 26 Wednesday overnight visits that are not accounted for by the alternating weekend visits commencing on Thursday instead of Friday; 7 days of summer; and 7 days of spring break. This figure does not include “date nights” or variable holidays.