Circuit Court for Baltimore County
Case No. 03-C-18-009598

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2005

September Term, 2019

NAKIA POPE

v.

NOLDON POPE

Graeff,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Salmon, J.

Filed: October 14, 2020

This appeal arises out of an order by the Circuit Court for Baltimore County resolving several motions by Nakia (McKinley) Pope, appellant, and her ex-husband, Noldon Pope, appellee, concerning custody and visitation of their two minor children. Ms. Pope raises the following questions, which we have rephrased for clarity:

> I. Did the circuit court err in denying mother's contempt motion because father relocated with their children to South Carolina from Maryland without her consent?
>
> II. Did the circuit court err in not awarding mother sole legal and physical custody of their children?
>
> III. Did the circuit court's visitation schedule unfairly favor father?
>
> IV. Did the circuit court's visitation schedule place an undue hardship on mother because it requires that mother give father 21 days of notice when requesting additional visitation?

For the reasons that follow, we shall affirm the circuit court's order.

FACTS

Mr. and Ms. Pope were married in 2012, and are the natural parents to two children, now aged 6 and 5. On May 5, 2017, the circuit court for Anne Arundel County granted the parties an absolute divorce, at which time the court also determined child custody, visitation, and support issues.[1] The court awarded sole legal custody of the children to father and shared physical custody to both parents. The court also set out a visitation schedule. Father was to have the children during the school year from Sunday to Friday and mother was to have the children on the weekends, from Friday to Sunday.

[1] Because this appeal does not concern child support, we shall not relate facts concerning that topic.

During the summer, the visitation schedule was reversed, with mother having the children from Sunday to Friday and father having the children on the weekends, from Friday to Sunday. The schedule allowed for weekly dinner visits with the parent who did not have the children during the week.[2]

About nine months later, on February 8, 2018, Mr. Pope filed a motion to modify visitation. Although nowhere in the motion did Mr. Pope specifically state his intention to move out of state or where or when he might move, he did relate allegedly inappropriate actions by Ms. Pope and her mother during transfers that distressed the children; that the "children have a very large network of stable family in South Carolina and will benefit from that environment"; and, because he is their primary care giver and provider, the children's "financial needs will be better served by the reduced cost of living in Greenville, South Carolina." He included proposed visitation schedules for mother: one starting May 2018 through August 2019, and another for when school began in August 2019. His schedule suggested transfer points in Henderson, North Carolina and Spartanburg, South Carolina.

On April 16, 2018, Mr. Pope apparently emailed Ms. Pope's attorney, advising of his intention to move with the children permanently to Greenville, South Carolina. Two days later, mother's attorney allegedly responded by email that Ms. Pope did not consent

[2] Ms. Pope appealed the circuit court's order. We affirmed on appeal. *See Pope v. Pope*, No. 598, Sept. Term, 2017 (filed April 23, 2018).

to his relocating with their children to South Carolina. On that day, she also filed a motion for an expedited pendente lite custody and access hearing.

Mr. Pope moved to Greenville, South Carolina with the children on May 2, 2018. On May 11, Ms. Pope filed a petition for contempt against father, alleging among other things, that father had "refused to communicate with [her] prior to making any decisions regarding the welfare of the children, including, but not limited to, doctor appointments, medication for the children, and relocation of the children out of state[.]" She asked the court, among other things, to temporarily modify the custody arrangement and grant her sole legal and primary physical custody of the children. On that same day, she also filed a counter-complaint for modification of custody and visitation, seeking sole legal and primary physical custody of the children.

A pendente lite hearing was held a month later. Following the hearing, the court issued an immediate temporary visitation order ("temporary order") denying mother's May 11, 2018, contempt petition and providing for a new visitation schedule. During the summer, the children would alternate three weeks with mother and one week with father, and in September, the children would be with father, except on the third Saturday of the month to the fourth Sunday of the month when they were with mother. The order set a pre-trial conference to decide custody for August 21, 2018. Ten days after the temporary order was issued, however, mother filed a motion to change venue from Anne Arundel County to Baltimore County, which was granted on September 12, 2018.

On October 30, 2018, mother filed a second complaint for modification of custody, again seeking sole legal and physical custody of the children. On May 10 and

September 30, 2019, she filed contempt petitions against father for violating the temporary order.

On October 22 and 23, 2019, the Circuit Court for Baltimore County held a hearing on the parties' various motions. Ms. Pope, her mother, and Mr. Pope testified at the hearing. Evidence elicited at the hearing included that Ms. Pope currently teaches second grade for Anne Arundel County Public Schools and lives in a four-bedroom home in Pikesville, Maryland with her mother. The deed to the home is in both their names. Mr. Pope is a retired firefighter and rents a three-bedroom rancher in Greenville, South Carolina. Ms. Pope has many family members living within several minutes of her home, and Mr. Pope has many immediate and extended family in Aiken County, South Carolina, about two hours from his home. Both parents are active in their churches, and their children have friends in the respective church youth groups. The parties communicate only through Our Family Wizard, a communication app designed for separated and divorced parents. Mr. Pope has set up a phone line just for Ms. Pope and the children to communicate, which is located on the children's table in their room. He testified that rarely does a day go by that the children do not speak to their mother. She testified that she communicates with the children every other day.

The children, who were almost six years old and four and a half years old at the time of the October 2019 hearing, attend all-day kindergarten at the same school in Greenville, South Carolina. Mr. Pope reported that the children are "thriving" and testified that both children are in the gifted and talented programs in school and are assigned accelerated coursework. He presented the children's progress reports and

homework to the court. He also presented photographs of the children at church, at school doing schoolwork and socializing, riding their bicycles to the library, picking vegetables in their backyard garden, at family gatherings and birthday parties, and a video of the children singing and playing Happy Mother's Day on the piano. Ms. Pope testified to the many activities that the children participate in when she has them, including trips to the library, Skyzone, and the zoo.

After hearing testimony and arguments from the parties, the circuit court ruled from the bench and then issued a written order. The court denied mother's contempt petitions filed on May 10 and September 30, 2019 and denied her motions to modify custody and visitation filed on May 11 and October 30, 2018. The court granted Mr. Pope's motion to modify visitation that he filed on February 13, 2018. The court then granted sole legal, and primary physical custody to father and set out a new visitation schedule. Mother subsequently filed a motion for reconsideration of the court's order, which the court denied. We shall provide additional facts below to address the questions raised on appeal.

DISCUSSION

I.

Ms. Pope argues that the circuit court erred when it failed to hold Mr. Pope in contempt for unilaterally moving to South Carolina. She argues that the court erred in not ordering him to move back to Maryland with the children because she was given insufficient notice of his move and the move was without her consent. Mr. Pope responds that the court did not err because Ms. Pope's contempt petition regarding his relocation to

South Carolina, which was filed on May 11, 2018, was argued at the pendente lite hearing on June 11, 2018, and denied by the temporary order issued by the court following the hearing, which she did not contest. According to Mr. Pope, because there was no contempt petition before the lower court regarding his move, Ms. Pope's argument is meritless. For the reasons that follow, we find that Ms. Pope's argument is not properly before us.

Mother filed four contempt petitions against Mr. Pope: February 5, 2018; May 11, 2018; May 10, 2019; and September 30, 2019. Nowhere in her appellate brief, however, does she state which contempt petition she believed the circuit court erred in not granting.[3] The first contempt petition was filed before Mr. Pope's relocation, so that cannot be the contempt petition underlying her argument. Additionally, neither of the 2019 petitions concerned Mr. Pope's relocation. Rather those petitions concerned father's failure to notify her of a doctor's appointment and failure to provide the children for a visitation under the temporary order. The circuit court denied those motions. This leaves only the May 11, 2018 contempt petition that could be the basis of her argument. As Mr. Pope correctly points out, however, that petition was argued at the pendente lite hearing and specifically denied in the court's temporary order issued on June 14, 2018.

In Maryland, "a party that files a petition for constructive civil contempt does not have a right to appeal the trial court's denial of that petition." *Pack Shack, Inc. v.*

[3] Ms. Pope provided, for our review, copies of only two of her contempt petitions: May 11, 2018, and September 30, 2019.

Howard County, 371 Md. 243, 246 (2002). "[O]nly those adjudged in contempt have the right to appellate review. The right of appeal in contempt cases is not available to the party who unsuccessfully sought to have another's conduct adjudged to be contemptuous." *Becker v. Becker*, 29 Md. App. 339, 345 (1975) (citing *Tyler v. Baltimore County*, 256 Md. 64, 71 (1969)). Therefore, even if Ms. Pope's argument was properly before us, we would have no jurisdictional basis to consider her argument.

II.

Ms. Pope argues that the circuit court erred in not granting her sole legal and physical custody of the children. She recognizes that the court considered the factors enunciated in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1978) when considering this issue. Nonetheless, she argues that the court erred in failing to weigh the factors in her favor. Specifically, she argues that the court erred by: 1) adopting the father's uncorroborated opinion that the children were "thriving" in South Carolina; 2) failing to adequately consider her testimony that the children were "thriving" in her care in Maryland; and 3) failing to recognize that having the children in her "care and custody is the only real option for the children to have a nurturing, stable, loving life[.]" Mr. Pope responds that his move to South Carolina was not a material change of circumstance, but even if it was, he argues that the court did not err in determining that the children were thriving in his care in South Carolina.[4]

[4] It is unclear, but it appears that throughout these proceedings Mr. Pope has only sought to change the visitation schedule between the parties and has not sought to change the status of the award of his sole legal, and shared physical custody. Nonetheless, at the (continued)

Standard of Review

In reviewing child custody determinations, we employ three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012) (citation omitted).

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). 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." *Lemley v. Lemley*, 109 Md. App. 620, 628 (citations omitted), *cert. denied*, 343 Md. 679 (1996). "Additionally, all evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party below." *Id.* (citation omitted). An abuse of discretion exists where "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." *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (quotation marks and citation omitted).

(continued)
hearing the circuit court and Ms. Pope's counsel viewed Mr. Pope's motion for modification as a request to change physical custody, although when announcing its decision, the court specifically recognized that Mr. Pope sought only to modify the visitation schedule whereas Ms. Pope sought modification of all custody provisions.

Custody Determination

Legal custody confers the "right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Taylor v. Taylor*, 306 Md. 290, 296 (1986) (footnote and citations omitted). Physical custody means "the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent[.]" *Id.* Joint physical custody is shared custody and need not be shared on a 50/50 basis. *Id.* at 296-97. Shared physical custody "most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights." *Id.* at 297. Proponents of joint physical custody point out many benefits, including, permitting both parents to function as, and be perceived as, parents, while detractors point out that it may create confusion and instability for children. *Id*. at 302. The Court of Appeals has noted that "[j]oint physical custody may seriously disrupt the social and school life of a child when . . . the homes are not in close proximity to one another." *Id.* at 308-09.

In *Sanders*, 38 Md. App. at 420, we set out ten non-exclusive factors for a circuit court to consider in child custody determinations: 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) the ability to maintain 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 opportunity for visitation; 9) length of separation from

the natural parents; and 10) prior voluntary abandonment or surrender. In *Taylor*, 306 Md. at 304-11, the Court of Appeals reiterated the *Sanders* factors but set out 14 factors it viewed as particularly relevant in making joint custody determinations: 1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; 2) willingness of parents to share custody; 3) fitness of parents; 4) relationship established between the child and each parent; 5) preference of the child; 6) potential disruption of 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; and 14) other factors.

In any custody determination, the Court of Appeals has stated that the paramount and overarching concern is "the best interest of the child." *Id.* at 303. *See Burdick v. Brooks*, 160 Md. App. 519, 528 (2004) (quotation marks and citation omitted) (In custody cases, the "court's objective is . . . to determine what custody arrangement is in the best interest of the minor children[.]"). Although "[t]he best interest standard is an amorphous notion, varying with each individual case," a fact finder should "evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future." *Sanders*, 38 Md. App. at 419.

Under Maryland law, the relocation of a parent to another state can constitute the material change in circumstances necessary to trigger the best interest analysis. *Braun v. Headley*, 131 Md. App. 588, 613 (2000) (citation omitted), *cert. denied*, 531 U.S. 1191 (2001). "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[.]" *Domingues v. Johnson*, 323 Md. 486, 500 (1991). Change is not to be lightly made but "[t]he benefit to a child of a stable custody situation is substantial, and must be carefully weighed against other perceived needs for change." *Id.*

Here, the circuit court had the opportunity to observe the witnesses in its custody determination, and specifically reviewed the *Sanders/Taylor* factors. Ms. Pope does not argue to the contrary. The court found both parties to be "very fit parents" and of "fine" character. The court found, however, that the parents had difficulty communicating. The court found that both parents have close family relations and similar material opportunities for the children existed in each home. Because father now lives in South Carolina, the court noted that the opportunity for visitation had changed. The court focused on what was in the best interest of the children and concluded that the children were doing very well in their current environment, and to remove them from this environment would not be in their best interest. In its custody award, the court kept sole legal custody with father, and changed physical custody from shared, to primary physical custody with father.

We cannot say that the circuit court abused its discretion in concluding that there had been a material change in circumstances or that its legal and physical custody determination was not soundly grounded in the best interests of the children in this case. Although the court did not discuss the move to South Carolina and seemed to treat it as a *fait accompli*, Ms. Pope presented the court with no evidence and made no argument in closing about the circumstances of the move. As to Ms. Pope's corroboration argument,

it is not necessary that a parent's opinion about his/her children be corroborated in a custody determination. In any event, Mr. Pope's opinion that the children were thriving in his care was corroborated by the progress reports, schoolwork, and pictures he presented at trial of the children engaged in various activities. We disagree with Ms. Pope's argument that the court failed to consider that the children thrived in her care as well, for the court appeared to find her to be an equally fit parent.

As to her last argument, that the best interests of the children were for her to have sole legal and physical custody, we are mindful that the court is in the best position to weigh the evidence presented. Given the distance between the parents' residences, that father is a stay-at-home parent, that the children are doing very well in their new location in South Carolina, and that the parties have difficulty communicating, the court awarded sole legal and primary physical custody to father. The court ruled on the evidence presented, and we find no abuse of discretion in the court's award. *See Lemley*, 109 Md. App. at 627-28 (A trial court's decision in a contested custody case "founded upon sound legal principles and based upon factual findings that are not clearly erroneous will not be disturbed in the absence of a showing of a clear abuse of discretion.") (citations omitted).

III.

Ms. Pope argues that the circuit court's visitation schedule must be reversed and revised because it is skewed to father's advantage. She argues that the schedule "blindly" follows Mr. Pope's proposed schedule, which benefits only father. She also argues that the transfer point of Oxford, North Carolina, which is four to four and a half hours from both parties' homes, is too long a drive for her and the children and unfairly compresses

her time with them. As an example, she directs our attention to her 2020 visitation schedule for Dr. Martin Luther King, Jr., holiday, from Saturday at 2 p.m. until Monday at 2 p.m. She argues that because of the compressed time and the distance to be traveled, she will essentially only have the children for a full day. Mr. Pope responds that the circuit court did not err in its visitation order. He asserts that the court's and his proposed visitation schedules were similar simply because they maximized the amount of time mother could spend with their children and tracked the children's school calendar. We find no error.

"'Decisions concerning visitation generally are within the sound discretion of the trial court [ ] and are not to be disturbed unless there has been a clear abuse of discretion.'" *Meyr v. Meyr*, 195 Md. App. 524, 550 (2010) (quoting *In re Billy W.*, 387 Md. 405, 447 (2005)). As we stated above, an abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court," or the trial court acts "without reference to any guiding rules or principles." *Santo*, 448 Md. 620 at 625-26 (quotation marks and citation omitted).

We cannot say that the circuit court abused its discretion in its visitation schedule order. Because of the geographical distance between the parties, it is undeniable that visitations will be more challenging than when the parties lived in Maryland, but the halfway point designated for transfers fairly splits this burden. The court ordered visitation schedule tracks the children's school year resulting in the least disruption possible while giving mother as much time as possible. Accordingly, we find no abuse of discretion by the circuit court.

IV.

The court visitation order states: "Mother will have the option for additional visitation to occur in South Carolina during the second weekend of any month during the school year, provided that Mother gives Father at least 21 days' notice of her intent to exercise this option[.]" Ms. Pope argues that the 21-day requirement "is not logical" because five days' notice would be sufficient and asks us to remand for a revision of the visitation order. Mr. Pope responds that the court did not err in ordering the 21-day notice. He argues that the notice is fair because it gives him time to prepare the children for a change in their schedules and minimizes the disruption that would occur in overbooking or canceling activities for the children, all of which allow Ms. Pope to be the priority for the weekend.

Given the parties well-documented difficulty in communicating effectively, we do not believe that the court abused its discretion in requiring 21-days' notice to change visitation. We agree with Mr. Pope that the 21-days' notice minimizes any disruption to the children's schedule and emphasizes Ms. Pope's scheduled time. We understand that the 21 days of notice is long for Ms. Pope, but given the parties difficulty in communicating effectively, and the fact that both children are getting older, attending school, and will be having more commitments, we find no abuse of discretion in the court's order.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.