UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0394

September Term, 2015

WAYNE ARTHUR BECK

v.

KELLY ANN BECK

Reed,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: May 27, 2016

*This is an unreported opinion, and it 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.

In 2010, Wayne Arthur Beck (hereinafter "Wayne"), appellant, and Kelly Ann Beck (hereinafter "Kelly"), appellee, amicably divorced after ten years of marriage. For a period of time after their divorce, the parties successfully co-parented their two children according to the terms of a Marital Settlement Agreement and an addendum thereto. However, sometime after Wayne remarried in June of 2012, the amicable relationship between the parties deteriorated to the point where Wayne filed a Complaint to Modify Custody, Visitation, Child Support and Other Related Relief in the Circuit Court for Anne Arundel County. Finding no material change in circumstances since the parties' divorce, the circuit court denied Wayne's request for a modification of the custody and visitation rights. Wayne filed a timely appeal and presents the following question for our review:

> 1. Did the trial court err or abuse its discretion when it determined that there was no material change in circumstances since the entry of [the] parties' Judgment of Absolute Divorce as it relates to visitation, physical custody, and/or legal custody?

For the following reasons, we answer this question in the negative and, therefore, affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Wayne Arthur Beck and Kelly Ann Beck were married for ten years when they were divorced by entry of a Judgment of Absolute Divorce on December 10, 2010 (hereinafter "the Judgement"). During their marriage, they had two children: Travis, born on April 28, 2002; and Danielle, born on January 6, 2006. Since the divorce, Wayne and Kelly's custody and visitation rights with respect to their son and daughter have been governed by a Marital Settlement Agreement dated August 6, 2009, and a document

entitled Addendum to Marital Settlement Agreement dated July 8, 2010 (hereinafter collectively referred to as "the Agreement").

The Agreement, which was incorporated but not merged into the Judgment, provides for the children to primarily reside with Kelly but have visitation with Wayne on Monday and Wednesday evenings and on alternate weekends from Friday through Sunday. The Agreement further provides that each parent is entitled to one week of summer vacation with the children, that the parents shall share the Easter, Thanksgiving, Christmas Eve, and Christmas holidays, and that Wayne gets the children on Father's Day and Kelly gets them on Mother's Day. This schedule, however, has been modified slightly in practice without any formal agreement. Instead of Wayne having the children for dinner on Monday and Wednesday evenings, he has had them on Monday and Tuesday evenings. Also, Wayne's alternate weekend visitation has been taking place from Friday through Monday instead of Friday through Sunday.

Wayne and Kelly are both employed by the National Security Agency at Fort Meade, Maryland, and thus have the same work and holiday schedule. Kelly resides in Severn, Maryland, in the former marital home. Wayne also resides in Severn. He bought his house in October of 2010 and lives with his wife, Cory, whom he married in June of 2012, and Jackson, Cory's son from a prior relationship.

In the immediate aftermath of the divorce, the parties had good communication regarding their exercise of joint legal custody and worked well together in coordinating Wayne's visitation with the children. However, this is no longer the case. Beginning around

the time Wayne remarried in 2012, the parties have had numerous disagreements, many of which appear in the record of the March 6 and 7, 2014, merits hearing before the Honorable Eugene Lerner of the Circuit Court for Anne Arundel County:

- Wayne testified that Kelly disapproves of him and Cory regularly taking the children to Catholic church services on Sundays, but Kelly testified that Wayne and Cory have only taken the children to a Catholic church once and that she did not have a problem with it.
- When the possibility of counseling for the children was discussed in late 2012, the parties disagreed as to whether it would be in the children's best interests to include Cory and Jackson in the sessions.
- Wayne testified that Kelly refuses to allow Cory to pick the children up for visitation or be alone with the children for any period of time; however, Kelly testified that there was only one occasion on which she did not allow Cory to pick up the children and that was because Wayne was out of town.
- The parties have opposite opinions regarding how Wayne's relationship with Cory and Jackson affects the children. Kelly testified that the adjustment to being in a "blended" family is why the children needed counseling, while Wayne testified that the children enjoy spending time with Cory and Jackson. He claims that Travis and Jackson, who are just fourteen months apart in age, play well together.
- Presently, the parties' only communication takes place *via* email. According to Kelly, this is so at Wayne's request. Wayne testified that their emails often have a

hostile tone, but Kelly testified that she sends Wayne daily updates on the children and that the emails between her and Wayne never contain derogatory comments, personal attacks, or cursing.

- Wayne testified that Kelly took away his ability to send text messages to the children's cell phones, even though she still texts them while they are at his house.
- According to Wayne, Kelly has begun to harass him about everything that goes on in his house while the children are with him.
- Wayne testified that Kelly has failed to act as a joint legal custodian by scheduling medical appointments for the children without contacting him first and by making Danielle play soccer against her will. Kelly disputes both of these allegations. She testified that she was the one who scheduled the children's doctor's appointments during their marriage and that she continued to do so, without any objection by Wayne, after their divorce. She testified that Wayne only expressed interest in the children's doctor's appointments after he filed his Complaint. Kelly's account of Danielle's participation in soccer is also different. According to her, Danielle would get nervous during games, but otherwise enjoyed playing soccer because her friend was on the team.

These disagreements had a snowball effect on Kelly and Wayne's relationship leading up to the filing of Wayne's Complaint on April 23, 2013.

By filing his Complaint, Wayne sought to have the visitation schedule amended to address days the children have off from school, the children's winter and spring breaks,

and certain federal holidays. He also wanted physical custody changed to a 50/50 arrangement consisting of a 5-2-2-5 schedule during the school year and alternate weeks during the summer. On March 7, 2014, at the conclusion of the merits hearing, the circuit court made an oral ruling that Wayne's visitation be amended slightly to conform with the schedule already being followed by the parties–*i.e.*, that Wayne's weekday visitation during the school year be on Monday and Tuesday evenings instead of Monday and Wednesday evenings.

Wayne filed a Notice of In Banc Review on July 7, 2014. The in banc panel noted that "even if the change is to an arguably minor time, it could be interpreted as a change." Because changes to custody or visitation require a finding of a material change in circumstances, the case was remanded for clarification as to whether a material change in circumstances had transpired since December of 2010. In an Order dated April 30, 2015, the circuit court clarified that "[a] finding was made that no material change in circumstances relating to the children's custody had occurred." The circuit court also stated that the change in Wayne's visitation from Monday and Wednesday evenings to Monday and Tuesday evenings "was intended to help, not harm the parents and children," and that despite the change "visitation would be the same amount of time. Everything would remain the same."

On May 13, 2015, Wayne filed a Notice of Appeal of the circuit court's April 30, 2015, Order. Thereafter, by separate Order dated May 28, 2015, the circuit court amended the last paragraph of its April 30 Order. On June 26, 2015, out of what he calls "an

abundance of caution," Wayne filed another Notice of Appeal, this time of the Order of June 1. His contention on appeal is simply that the circuit court erred in determining that no material change in circumstances has occurred since the Judgment was entered in 2010.

DISCUSSION

I. MATERIAL CHANGE IN CIRCUMSTANCES

A. Parties' Contentions

Wayne argues that "the trial court erred or abused its discretion when it determined that no material change in circumstances existed since the entry of . . . [the] Judgment [in December of 2010]." He asserts that the circuit court should have found that a material change in circumstances has occurred based on: the children being in counselling since January of 2013; his marriage to Cory and the fact that Cory and Jackson moved into his house; the "wonderful and affectionate relationship" the children have developed with their stepmother; the children "now hav[ing] another sibling in Jackson;" Kelly's refusal to allow the children to be alone with Cory and her disapproval of the children attending Catholic church services; his communication with Kelly having gone from "good to very bad" since the divorce; the fact that Kelly took away his ability to send text messages to the children; and Kelly's micromanagement of his visitation, her scheduling of doctor's appointments for the children without his knowledge, and the fact that she unilaterally forced Danielle to play soccer. Wayne also contends that the children, who were seven and four when the divorce was finalized but are now thirteen and nine, have "outgrown" the existing visitation schedule. In addition, Wayne argues that the visitation schedule

contained in the Judgment "is very vague, ... does not provide consistency for the children, . . . and causes both parties to try to manipulate their own rules." Therefore, he requests that we reverse the judgment of the circuit court and remand for further proceedings.

Kelly argues that Wayne has failed to meet his burden of showing that "there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child[ren] for custody to be changed." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008). Citing *McCready v. McCready*, 323 Md. 476, 482 (1991), she asserts that "[a] change in circumstances is material only when it affects the welfare of the children." Therefore, because "Wayne, Cory and [she] all agree that the children are happy and healthy, well-behaved, well-mannered, outstanding students and well-adjusted," Kelly contends that the circuit court did not abuse its discretion in finding that no material change in circumstances has occurred. Kelly disputes many of Wayne's claims regarding their recent ability to exercise joint legal custody over Travis and Danielle. She argues that she generally has no problem with Cory being alone with the children, that she has never tried to stop Wayne and Cory from taking the children to a Catholic church, and that Wayne has exaggerated the recent breakdown in their communication. Therefore, Kelly prays that we affirm the circuit court's judgment that Wayne did not meet his burden of proving a material change in circumstances.

B. Standard of Review

In *McMahon v. Piazze*, 162 Md. App. 588 (2005), we noted that

> [w]hen presented with a request for a change of, rather than an original determination of, custody, courts employ a two-step

> analysis. First, the circuit court must assess whether there has been a "material" change in circumstance. If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody.

Id. at 593-94. However, we went on to explain that "[t]hese two analyses . . . often are interrelated." *Id.* at 594. This is because

> although there sometimes clearly exists no change in circumstance triggering a reevaluation of the custody arrangement, "[i]n the more frequent case, . . . there will be some evidence of changes which have occurred since the earlier determination was made. Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. Thus, the question of 'changed circumstances' may infrequently be a threshold question, but is more often involved in the 'best interest' determination[.]"

Id. (quoting *McCready*, 323 Md. at 482). Thus, a circuit court's decision whether to modify a custody or visitation order often boils down to what is in the best interest of the child. Its determination in this regard, "when . . . founded upon sound legal principles and based upon factual findings that are not clearly erroneous, . . . should be disturbed only if there has been a clear abuse of discretion." *Davis v. Davis*, 280 Md. 119, 126 (1977).

C. Analysis

We have made it abundantly clear that "determinations concerning visitation are within the sound discretion of the trial court as it is in the best position to assess the import of the particular facts of the case and to observe the demeanor and credibility of the witnesses." *Beckman v. Boggs*, 337 Md. 688, 703 (1995) (citing *Petrini v. Petrini*, 336 Md. 453, 470 (1994)). Furthermore, "[t]he paramount consideration must always be that which

best fulfills the needs of the child." *Beckman*, 337 Md. at 703. In the present case, the circuit court determined that "under the circumstances . . . it's in the best interest of the children to remain with the same schedule they presently have." In reaching this conclusion, the circuit court explained during its oral ruling that the children are doing well:

> I really don't believe there should be any change in the method in which they operate presently, because the children–I'm concerned about the children, and I know that they're doing very well, and for me to make a change I think would be wrong. As long as they're doing well–one of them is doing the STEM [sic] program and one of them is on the honor roll [sic] and they appear to be doing very well.

With respect to the burden of proof, which is "on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child[ren] for custody to be changed," *Sigurdsson*, 180 Md. App. at 344, the circuit court, again during its oral ruling, stated that "the burden of course is . . . on Wayne to prove that . . . [the visitation schedule] was wrong or should be changed in some way. I don't think he's met the burden." Wayne asserts that this ruling amounts to an abuse of discretion. We disagree.

Both parties acknowledge that in order to obtain a change in custody or visitation, a material change in circumstances must be proven, *See Green v. Green*, 188 Md. App. 661, 688 (2009), and that "[a] change in circumstances is material only when it affects the welfare of the child." *Id.* (citing *McCready*, 323 Md. 476). In its Order dated April 30, 2015, the circuit court explicitly stated that "[a] finding was made that no material change

in circumstances relating to the children's custody had occurred after December, 2010." For us to hold that this finding amounts to an abuse of discretion, we would have to determine that "no reasonable person would take the view adopted by the [trial] court, or . . . [that it] act[ed] without reference to any guiding rules or principles." *North v. North*, 102 Md. App. 1, 13 (1994) (internal citations and quotations omitted). Because the trial court's finding was reasonable, we hold that it does not amount to an abuse of discretion.

Kelly, Wayne, and Cory were the only individuals who testified at the merits hearing on Wayne's request for a modification and they all agreed that the children are doing well. When Cory was asked on cross-examination whether the children are "happy, healthy, [and] normal," she answered "Yes." She had testified earlier during direct that "[t]he children are pretty healthy. They're average, normal, healthy kids. They get normal colds and such here and there, but they're healthy kids." She explained that Travis is very smart and is in an "accelerated" math and engineering program at school known as STEM. Cory also testified that Travis was in taekwondo at the time of the hearing and that he had participated in bowling and baseball in the past. She described him as being "very into . . . learning," "pretty active," and "pretty good with the flow."

With regards to Danielle, Cory testified that she "is definitely more outgoing and more verbal. She's very whimsical, theatrical. She's very full of life. She's very silly sometimes, so she likes to have fun. She'll try just about anything." Cory went on to say that Danielle enjoys dance, getting dressed up for church, and "girly things."

Based on Cory's testimony, there is no indication that the children's welfare has been negatively affected by the current visitation schedule. When asked about the children's mood when they go back to Kelly's house at the end of their visitation with Wayne, Cory testified:

> It varies, but for the most part it's kind of they're coming down and you know, well it's time to go. The younger one, Danielle, she's very clingy. She'll jump up on me and put her arms and her legs around me, and she'll go, oh. I mean, I think that's her age, but she's very comfortable showing her affection. And sometimes she seems a little bummed to have to go because they're having a good time.

Other than for the fact that Danielle "seems a little bummed" when she has to leave Wayne's house, Cory believes there should be a change in custody and visitation because she thinks that

> the kids both want to spend time with both their parents. They seem to enjoy being with Wayne, with myself and our family environment as well. I think 50/50 is very fair. I think both parents would be fitting for that. I don't see any reason why there wouldn't be at this point.

As we have already indicated, there must be a material change in circumstances that negatively affects the welfare of the children in order to change the custody arrangement or visitation schedule. The evidence elicited during Cory's testimony that a change in custody would be "fair" because she "[doesn't] see any reason why there wouldn't be [a change] at this point" does not manifest a material change in circumstances, much less demonstrate that the circuit court abused its discretion in finding that such a change had not occurred.

Wayne also testified. He stated his reason for seeking a modification of custody and visitation as follows:

> This current agreement has a lot of holes in it. It's very vague. It causes a lot of back and forth. There's no consistency and because of that, it allows Kelly and I to try to manipulate our own rules and it [sic] causes a lot of conflict, a lot of stress. We get into e-mail battles for two weeks at a time and it's not healthy for either one of us. We need a more consistent agreement that gives us both more time and it allows us both to be parents on our own grounds.

However, while Wayne asserts that the current custody arrangement and visitation schedule causes tension between himself and Kelly, he does not claim that the children are not doing well because of them. The following colloquy, which took place almost immediately after the lunch recess on the first day of the merits hearing, evidences this point:

> [Counsel on direct]: Mr. Beck, describe your children for the Court?
>
> [Wayne]: Travis is very lovable, energetic–
>
> [The Court]: I want to cut it short. I know the children are wonderful. So with that, there's no point in dragging that out. I've heard it. I don't think there's any question about it. **And they're doing well.**

The circuit court's finding that no material change in circumstances had occurred is based on this very fact–that the children are doing well. "A change in circumstances is material only when it affects the welfare of the child[ren]," *Green*, 188 Md. App. at 688, and the children's welfare, even according to Wayne's own testimony, has not been affected.

The attempt to obtain a modification in custody and visitation seems to have been driven by Wayne's desire to improve communication with Kelly and to spend more time with the children; not by the fact that the children's welfare has been negatively affected by their parents' weakened relationship. This point is further illustrated by the following, which is taken from the transcript of the end of Wayne's testimony on direct:

> [Counsel]: Do you believe that an equal access schedule will help improve the communication between you and Ms. Beck?
>
> [Wayne]: Absolutely.
>
> [The Court]: I think that's about the third time you've asked him.
>
> [Counsel]: Have I?
>
> [The Court]: That's about the third time.
>
> [Counsel]: All right. No more questions, Your Honor.

It is also demonstrated by the following portion of the transcript, which was taken from Wayne's testimony on cross:

> [Counsel]: Now, Mr. Beck[,] with respect to the current schedule, you and your wife–and your ex-wife, excuse me, I apologize–and Kelly, had been able to [sic] resolve the visitation over the holidays; is that correct? There has been some difficulty, but it's been resolved?
>
> [Wayne]: Yes.
>
> [Counsel]: And you're saying–your testimony was that the problem was she always wanted to share the holidays 50/50, meaning equal time over the holidays–
>
> [Wayne]: Yes.

> [Counsel]: –and you didn't agree with that, because you wanted additional time over the holidays because you don't have overnight–you have the current schedule you have?
>
> [Wayne]: No, that's not what I said. What I was alluding to was the hypocrisy that we had to split everything 50/50 except for the regular time with the children. That's where the conflict always came in. Why am I good enough to split everything else, but I'm not good enough to have my children half the time. I mean, currently right now, 48 overnights, 98 visitation days. She has the rest. I have no time to bond with my children.

Despite that communication between the parents could be improved and Wayne would like to spend more time with his children, the circuit court found that "the children are doing fine, [and] that's the overriding concern."

Wayne argues that the children's age, when combined with his remarriage to Cory and the various disagreements he has had with Kelly, constitutes a material change in circumstances. However, in *McMahon*, we noted that a child's age, as well as "the mother . . . [being] divorced and remarried multiple times," 162 Md. App. at 595-96, is insufficient to constitute a material change in circumstances. *Id.* We noted that "the increased age of the child [is] particularly unpersuasive 'because aging is an inexorable progression prevalent in all custodial contests.'" *Id.* at 596 (quoting *Campbell v. Campbell*, 477 S.W.2d 376, 378 (Tex. App. 1972)).

The reasons for the requirement of a finding of a material change in circumstances affecting the welfare of the child in cases involving requests for changes in custody or visitation is "intended to preserve stability for the child and to prevent relitigation of the same issues." *McMahon*, 162 Md. App. at 596. The burden is on Wayne to show that "there

has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child[ren] for custody to be changed." *Sigurdsson*, 180 Md. App. at 344. The circuit court did not abuse its discretion in finding that Wayne did not meet this burden. Although the current custody arrangement and visitation schedule may be affecting the welfare of Kelly and Wayne's relationship with each other, the evidence does not indicate that the welfare of the children has been affected such that it would be in their best interest for custody and visitation to be changed.

Therefore, we affirm the judgment of the circuit court.

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