UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1316

September Term, 2015

ANGELA L. WILLIAMS

v.

VINCENT C. WILBURN

Meredith,
Nazarian,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: April 29, 2016

For several years, Angela L. Williams ("Mother") and Vincent C. Wilburn ("Father") had agreed to share residential custody of their son ("A."), with Mother having primary custody. After moving from Howard County to the Eastern Shore to take a better paying job, Mother alleged a material change in circumstances and filed a complaint to change custody. Father counterclaimed on the ground that Mother's move had diminished his access to A. The Circuit Court for Howard County placed the child in Father's primary physical custody. Mother appealed.

QUESTIONS PRESENTED

Mother presents the following questions:

1. Did the circuit court err in determining that there had been a material change in circumstances warranting a re-examination of custody arrangements?
2. Did the circuit court err by modifying the custody arrangements?
3. Did the circuit court err by awarding attorney's fees for discovery violations?

At oral argument, Mother correctly conceded that there had been a material change in circumstances, as she was required to do, having initiated these proceedings for a change of custody. Accepting that a material change occurred, we hold that the court did not abuse its discretion in modifying the custody arrangements as it did. The issue of fees is not properly before us because the circuit court has merely indicated an intention to award fees, but (at least as of the time when the parties filed their briefs) had not yet awarded fees in any amount. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Although Mother and Father were never married to each other, Mother gave birth to their son, A., on September 3, 2009. At the time of the proceedings in this case, A. was five years old.

Both parents have doctorates. Father is an engineer with an aerospace company. Mother works in the field of public education. Until January 2015, both Father and Mother lived within 15 or 20 minutes of one another in the general vicinity of Laurel, Columbia, and Burtonsville. A.'s doctors have offices in Laurel and Columbia, and his dentist is in Columbia.

Mother and Father had worked out a custody and visitation agreement, in which they shared legal custody and physical custody of A. Under the agreement, which the court approved as part of an order of absolute divorce on February 1, 2012, A. spent approximately 64 percent of his time with Mother and 36 percent (including about 130 overnight visits per year) with Father. Father had A. on alternate extended weekends, from Thursday to Tuesday, and on Father's off-weeks, A. spent one night with Father. "In the event of a major dispute or change in circumstances regarding the terms" of the custody and visitation agreement, the parents agreed to attend mediation "before bringing any action in court."

Mother finished her doctorate in 2012. In 2014, she left her job with a state university in Prince George's County, secured a new job, with better pay, in Virginia, and in November 2014 informed Father that she was contemplating moving to be closer to

her new job. However, just a month later, on December 17, 2014, she informed Father that she was moving to the Eastern Shore, having received an offer for another job with better pay at a state university on the Shore. Two days later, on December 19, 2014, Mother filed a motion to modify the custody order, without first pursuing the precondition of mediation, which the court-approved agreement required.

Two weeks later, on January 3, 2015, Mother moved, with A., to Cambridge, in Dorchester County. Father did not consent to the move. A few months later, Mother and A. moved even farther away from Father, to Delmar, in Wicomico County, about three hours away from Father. She did not involve Father in the decision about which daycare A. would attend.

For the first month after the move, Father had no visits with A. After Father engaged an attorney, visitation resumed, but he was often required to stay in a hotel on the Eastern Shore for his weeknight visits, because the alternative was to spend hours in the car driving to pick up A. on the Eastern Shore, driving A. to Father's home in Montgomery County for an overnight visit, returning A. to the Eastern Shore early the next morning, and driving back to Father's place of business on the Western Shore. On some occasions, Mother met Father on his side of the Chesapeake Bay to exchange the child. Father contended that A.'s demeanor had changed since the move: he acted out more and gave up more easily than he had in the past.

After several months and some discovery disputes, the court held a hearing in August 2015. Because the child was about to start school, much of the case focused on

the desirability of having him live in a single place and attend a single school. Mother asked to do away with Father's weekday visits. Father requested primary physical custody. Both parents also requested attorneys' fees under Md. Code (1984, 2012 Repl. Vol.), § 12-103 of the Family Law Article.

In a lengthy oral opinion, the court found that Mother and Father were both fit parents. Both parents participated extensively in A.'s life. Both parents were involved in A.'s education and had his best interests at heart. Both parents were willing to foster a relationship with the other parent and even the other parent's family. Both parents worked together with no notable incidents, for three years. Neither parent challenges these findings – nor could they, as it is very clear that both are loving, devoted, and capable parents.[1]

The court also found that Mother's relocation amounted to a material change in circumstances. Mother now concedes that the court's finding was correct.

The court reviewed, at great length, the factors pertaining to a determination of the child's best interests in custody cases in general (*see Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1978)), and in cases involving relocation. *See Domingues v. Johnson*, 323 Md. 486 (1991); *Braun v. Headley*, 131 Md. App. 588 (2000). Most of those factors favored neither parent, except for the child's interest in

[1] The circuit court took note of Father's testimony that Mother is a fit and proper parent, that she is a very good mother, and that she is very detail-oriented. The circuit court also took note of Mother's testimony that A. has a good relationship with Father.

stability, which, the court found, tilted the scale in Father's favor. Aside from stability, "[e]verything else," the court said, "seems to go either way."

On the subject of stability, the court expressed concern that Mother's position was impermanent, that she might lose her new job, and that the child might be "uprooted again." By contrast, Father offered stable employment and home life in an environment in which the child was used to living, where his friends, daycare, and healthcare providers were located, and where his step-father (Mother's husband) continued to live. For those reasons, the court found that it was in the child's best interest for Father to have primary physical custody.

In discussing the subject of stability, in its extemporaneous, oral ruling, the court said:

> [T]he mother was going to move to the Northern Virginia area[,] then changed her mind and moved to Cambridge and then changed her mind . . . and has now moved to Delmar[,] which is even further away. So, in that sense, the mother has been unstable.

The court awarded primary physical custody to Father, dividing up weekends, summers, and holidays between the parents. The court denied most of the attorneys' fees requests, but did not deny the "request for counsel fees due to [Mother's] failure to comply with an Order compelling discovery," which the court stated would "be addressed by a separate Order." The record reflects no such order.

Mother filed this appeal.

DISCUSSION

Having withdrawn her challenge to the court's finding of a material change in circumstances, Mother principally objects to the circuit court's statement that she "has been unstable." She argues that the court abused its discretion in relying on that determination in modifying custody. Mother also argues that the circuit court awarded attorneys' fees to Father for discovery violations and that the court erred by failing to examine the necessary statutory factors pertinent to an award under the Family Law Article.

I. Custody

"Courts must engage in a two-step process when presented with a request to change custody." *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). "First, the circuit court must assess whether there has been a 'material' change in circumstance," *id.* (quoting *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)), *i.e.*, "a change in circumstances that affects the welfare of the child." *Id.* at 171 (citing *McMahon*, 162 Md. App. at 594); *accord Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). If the court finds a material change in circumstance, it "proceeds to consider the best interests of the child as if the proceeding were one for original custody." *Gillespie*, 206 Md. App. at 170 (quoting *McMahon*, 162 Md. App. at 594).

Because Mother agrees that there was a material change in circumstances, the circuit court properly reached the question of custody modification. Once a court determines that there has been a material change of circumstances, determining "which

parent should be awarded custody rests within the sound discretion of the trial court[,] . . . guided first, and foremost, by what it believes would promote the child's best interest." *Braun v. Headley*, 131 Md. App. at 596 (citing *Robinson v. Robinson*, 328 Md. 507, 513 (1992)). In reviewing an exercise of discretion, we reverse only "where it is apparent that some serious error[,] abuse of discretion[,] or autocratic action has occurred." *In re Yve S.*, 373 Md. 551, 583 (2003) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). "[T]o be reversed 'the decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *In re Yve S.*, 373 Md. at 583-84 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. at 313).

The cases set out a variety of different standards, considerations, factors, issues, or other methods of weighing and determining what is in a child's best interests. *See, e.g.*, *Domingues*, 323 Md. at 498-503; *Braun v. Headley*, 131 Md. App. at 610-13. We need not run down an exhaustive list of these factors, however, as the court determined that all but one of the factors favored neither parent. The only factor the court found significant was the child's interest in stability.

Mother argues that the court classified her as "unstable" and made its custody determination based on that erroneous conclusion. We agree that the court said, "[I]n a sense, the mother has been unstable." Notably, however, that the court expressly used the word "unstable" in a specific "sense." In that "sense," the court was not impugning Mother's emotional or financial stability; the court was discussing Mother's living and

employment arrangements, which had changed abruptly on several occasions in a brief period and, could plausibly change again if the new employer did not renew her contract.

Stability may often "cut[] both ways." *Domingues*, 323 Md. at 502. "Continued custody in the mother, the primary caretaker in fact, certainly offers an important form of stability in the children's lives." *Id*. But this is not the only factor a court must consider. "[P]ermitting the children to remain in an area where they have always lived, where they may continue their association with their friends, and where they may maintain frequent contact with their extended family, also provides a form of stability." *Id.* at 502-03. Hence, the issue of stability "cannot be determined as a matter of law." *Id.* at 503.

Sometimes "both parents are entirely 'fit' to have . . . custody of a child, but joint custody is not feasible." *Id.* at 492. In those cases, of which this is one, "the [judge] must exercise his or her independent discretion to make the decision." *Id*. Here, the experienced circuit court judge patiently evaluated all of the evidence in light of the governing legal standards and determined that it was in the child's best interest to award primary physical custody to Father. The court's decision was particularly difficult because A. has two excellent and deserving parents. When two parents both want to separately raise one child, "there are no winners." *Goldmeier v. Lepselter*, 89 Md. App. 301, 304 (1991). This Court has no basis to second-guess the difficult decision that the circuit court reached in the conscientious exercise of its discretion.[2]

[2] As Father's counsel conceded at oral argument, the evidence was such that the court could reasonably have exercised its discretion to award primary physical custody to

II. Attorneys' Fees

In addition to the custody decision, Mother has challenged the circuit court's determination that she must pay some unspecified portion of Father's attorneys' fees because of a discovery violation. We cannot review this issue, however, as there is no appealable judgment to review.

Unless otherwise allowed by statute, a party may appeal only "from a final judgment entered in a civil or criminal case by a circuit court." Md. Code (1974, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article ("CJP"). Although the custody order lacks some aspects of finality (because a court can modify it upon proof of a material change in circumstances), it is immediately appealable under CJP § 12-303(3)(x), which concerns orders "[d]epriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order." The same cannot be said about the announced decision to award an unspecified amount of attorneys' fees on account of a discovery violation.

When a court decides to award attorneys' fees under a statute or rule, the decision is considered to be "collateral" to the merits. *See*, *e.g.*, *Blake v. Blake*, 341 Md. 326, 336-38 (1996); *see also Johnson v. Wright*, 92 Md. App. 179, 181-82 (1992). The decision on the merits, if otherwise appealable, is not divested of its status as an appealable judgment merely because the court has not yet fully adjudicated the statutory or rule-based claim

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Mother. In accordance with our obligation to defer to the circuit court's reasonable exercise of its discretion, we would have been required to uphold that decision as well.

for fees. *Blake*, 341 Md. at 336-38. When the court actually adjudicates the statutory or rule-based claim for fees by entering an order quantifying the amount of fees that Mother must pay, she may obtain appellate review of that decision by filing a notice of appeal within 30 days after the clerk enters the order on the docket. *See Md.-Nat'l Capital Park & Planning Comm'n v. Crawford*, 307 Md. 1, 36-38 (1986).

Here, the circuit court stated that Father's "request for counsel fees due to [Mother's] failure to comply with an Order compelling discovery" would "be addressed by a separate Order of Court." We do not see such a separate order. Until the circuit court issues that order, the clerk makes a proper record of it on the docket (Md. Rule 2-601(a)), and Mother takes a timely appeal, we will have no appellate jurisdiction over the issue of attorneys' fees. In fact, until the court computes the amount of fees, the issue will not even be fully ripe. We therefore decline to examine the question of fees.

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