Circuit Court for Baltimore City
Case No. 24-D-12-003689

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2066

September Term, 2019

T.W.

v.

O.C.

Fader, C.J.,
Kehoe,
Nazarian,

JJ.

Opinion by Fader, C.J.

Filed: October 20, 2021

The appellant, T.W. ("Father"), challenges an order of the Circuit Court for Baltimore City that granted a motion to modify custody filed by the appellee, O.C. ("Mother"), and awarded Mother primary physical custody of the parties' minor child ("Child").[1] We discern no error or abuse of discretion in the court's ruling and will therefore affirm.

BACKGROUND

The 2013 Consent Order

The parties are the parents of Child, who was born in 2008. In November 2012, Mother filed a complaint for custody, in which she sought sole physical and legal custody of Child. Father filed an answer and counter-complaint, in which he asked the court to grant joint physical and legal custody of Child. In March 2013, Mother and Father agreed to the entry of a consent order, which, among other things, granted the parties shared physical custody and joint legal custody of Child. Pursuant to a parenting plan that was incorporated into the consent order, Mother and Father would have custody on an alternating "two, three and two" schedule that the parties had been following voluntarily since 2011. Physical custody during the summer months and on holidays was apportioned "50/50," with no set schedule.

Mother's Request for Modification of Custody

In February 2019, Mother filed a petition to modify custody in which she requested that the court grant her sole physical and legal custody of Child, and award Father

[1] We use initials for the parents and refrain from using Child's name to protect Child's identity.

visitation. In October 2019, the court held a hearing at which Mother and Father were the only witnesses. Both parties were represented by counsel.

The evidence adduced during the hearing included that Child was 11 years old and in the sixth grade. Child had attended the same school since 2012 and generally received good grades. Although the parties had lived relatively close to each other in northeast Baltimore City when the consent order was entered in 2013, with Child's school located between them, Mother had moved to Randallstown in 2017. At the time of the modification hearing, Mother was engaged to be married and lived with her fiancé in Randallstown. According to Mother, Child had developed a loving relationship with Mother's fiancé.

Father testified that in the fall of 2017, he felt that Child needed to be seen by a therapist because Child was "confused" and "disturbed" by her mother's new relationship. In addition, he stated that Child's behavior at school had changed in that Child had become excessively "talkative" in class and had problems following directions. Mother consented to Child seeing a therapist, because it had been recommended by Child's teacher, and agreed to Father's choice of therapist.

Mother testified that Child's behavior "ramped up" in 2018 and "she was in trouble every single month." In October 2018, Child punched another student, who was then taken to the hospital. According to Mother, Child then lied about the incident. Because of the incident, Mother participated in a conference at Child's school, during which she learned that Child might be charged with juvenile delinquency if she hit the student again.

As a "scare" tactic, Mother told Child that she would be transferred to a different school if her behavior did not improve. Child continued to get into trouble, however, which

led Mother to think more seriously about the option. Soon after the punching incident, Mother sent a text to Father which stated:

> Just a FYI, [Child] has one more time to act out in school and I'll be transferring her. She has been in trouble a total of 3 times and it's not even the end of October. Allowing her to stay at [her current school] is not benefitting her and she needs to understand that acts have consequences.

Father responded, "No. . . . I don't give m[y] consent. You can't make that decision. [Child's school] is a GOOD school. What you're suggesting makes no sense." Mother agreed with Father's opinion of the school but insisted that the school was not holding Child accountable for her behavior. Mother took no affirmative action to transfer Child to a different school after Father refused to consent because she understood that it would violate the custody agreement.

In April 2019, Child was "consistently in trouble" at school because she "talk[ed] too much" or was otherwise disruptive in class. Mother met with Child's teachers and the principal of the school and discussed whether changing schools would be beneficial. Because Mother believed that going into sixth grade, the start of middle school, would be an ideal time to transfer to a new school, she proposed to Father that Child begin sixth grade at the public middle school in the school district where she lived. Father was opposed to a change in schools.

Following the April 2019 meeting, Child's teachers began issuing a daily written report on Child's behavior that Mother and Father were required to sign. At the time of the modification hearing in October 2019, Child was serving a two-day in-school suspension for kicking another student.

Mother testified that "it's been difficult for [Child] in these last two years to adjust." Mother added that Child's schoolwork was becoming increasingly difficult, and that it was "harder for [Child] to stay on pace, even though she's in honors classes, because it's different - - it's just very different." Child was "more worried . . . than she used to be" that she would not be at "the top" of her class.

Mother expressed her belief that Child's behavioral issues were compounded by different parenting styles and a lack of routine. Mother said that Father imposed "no consequences" when Child was in trouble at school, and Mother testified that she was "more consisten[t]" in her expectations of Child. When asked why a change in physical custody would be in Child's best interests, Mother explained:

> I just want [Child] during the week so that she is consistent - we're consistent with the homework, with her routine. So everything is consistent. And school is going to get harder so she needs more consistency. I don't see how [shared physical custody] is going to benefit her when she's in high school and the classes are harder. It's not going to work.

Mother stated that Father would be able to see Child whenever he wanted during the week.

In addition to the disagreement over transferring schools, the parties testified in detail about difficulties they had encountered in communicating and making shared decisions under the joint custody arrangement. For example, despite Mother's objection, Father enrolled Child as a subject in a child development study that compensated participants for undergoing an MRI of the brain. Father stated that Mother unilaterally decided to discontinue Child's participation in Girl Scouts because it was "inconvenient" for Mother. There was evidence that both parties failed to share information about Child's doctor's visits and issues at her school. Both parties also acknowledged that they had

refused to transport Child to activities that the other party had arranged because there had been no discussion or agreement about the activities.

In closing argument, Mother argued that there had been a material change in circumstances since the entry of the consent order that warranted modification of custody. She sought primary physical custody of Child, maintaining that it was in Child's best interest to live with Mother during the school week, and with Father two or three weekends each month. Mother proposed that, during the summer, Child would alternate weekly between Mother's home and Father's home. Due to the parties' inability to agree, Mother requested that she be granted sole legal custody or, in the alternative, tie-breaking authority in case of an impasse.

Father asserted that there was no material change in circumstances that warranted a change in physical custody. He argued that Child was happy at her current school and was doing very well academically. He characterized the two instances of assaults on other students as inconsequential, and he maintained that Child's excessive talking during class was normal and "nothing new." He thus opposed any change to the shared physical custody arrangement of the 2013 consent order, requested that the parties retain joint legal custody, and asked that he be granted tie-breaking authority on matters involving legal custody.

The Court's Ruling

The court found that there had been a material change in circumstances since the entry of the 2013 consent order, specifically noting Mother's move from Baltimore City, Mother's new relationship, and the disagreement over transferring Child to a different

school. The court also pointed to increased animosity between the parties and their failure to communicate and share information.[2]

The court continued joint legal custody but granted tie-breaking authority to Father, primarily to ensure that Child did not transfer schools mid-year. In doing so, the court admonished the parties that joint custody required discussion and joint decision-making rather than simply informing the other of unilateral decisions. The court then addressed physical custody, stating:

> I have a concern about [Child] switching, because of the distance [between] where [the parties] live. I have concerns about her spending this weird time, two days and three days and then two days. It splits up her school week and she's got homework to do. I don't know how she's going to accomplish that, continue to accomplish that with a [two, three, two] schedule.
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> . . .
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> As far as the physical custody is concerned, I do believe she needs more consistency and structure [ ] during the school week. I think she does need more attention to her homework. Less attention to the outside sports, activities. She needs some, but she doesn't need all of these. She doesn't need to be involved in everything.
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> And it's difficult, I think, between [Randallstown] and Northeast Baltimore to get the child back and forth. To Girl Scouts, or to anything else. . . . And it's very difficult to do a [girl scout] troop in Randallstown or . . . Northeast Baltimore and have this child, who might happen to be living with the parent in the other place, get to a troop meeting or get to an activity.
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> So I'm going to give primary physical custody to [Mother] during the school week. [Father] has three weekends of the month. [Father] also has four weeks in the summer, two of which can be non-consecutive.

[2] In addition to the changes in custody that are in dispute in this appeal, the court ordered the parties to participate with Child in family counseling.

The court then implemented a holiday schedule.

The court subsequently entered a written order consistent with its oral ruling. Father noted this timely appeal.

DISCUSSION

"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." Md. Rule 8-131(c).

"[T]here are three distinct aspects" to appellate review of a child custody determination. *Burak v. Burak*, 455 Md. 564, 616 (2017).

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second], if it appears that the [hearing 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 [hearing court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [hearing court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 616-17 (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

THE CIRCUIT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN MODIFYING CUSTODY.

Consideration of a motion to modify custody involves a two-step process. "First, the circuit court must ascertain whether there has been a 'material' change in circumstance." *A.A. v. Ab.D.*, 246 Md. App. 418, 433 n.10 (2020) (quoting *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)). If no such material change has occurred, "the court's inquiry must cease." *Braun v. Headley*, 131 Md. App. 588, 610 (2000). "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." *A.A.*, 246 Md. App. at 433 n.10 (quoting *McMahon*, 162 Md. App. at 594).

Father contends that the order modifying custody must be reversed because (1) the court erred in finding a material change in circumstances, and (2) the evidence demonstrated that it would be contrary to Child's best interest to grant primary physical custody to Mother. We shall address each contention in turn.

The rule that a custody award may not be modified absent a material change in circumstances is intended to "preserve stability for the child and to prevent relitigation of the same issues." *Kreyhsig v. Montes*, 225 Md. App. 418, 425 (2015) (quoting *McMahon*, 162 Md. App. at 596). "In [the custody modification] context, the term 'material' relates to a change that may affect the welfare of the child." *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996)).

Here, it was undisputed that, since the entry of the 2013 consent order, Mother relocated from Baltimore City to Baltimore County and became engaged to be married. There was also increased animosity between the parties that resulted in a breakdown of communication: the parties were failing to share information related to Child's health and education with each other, and they were unable to agree on important decisions, including where Child should attend school and whether she should have had an MRI of her brain. We have little doubt that the welfare of a child may be affected by such changes. Accordingly, we conclude that the court's finding of a material change in circumstances was not clearly erroneous.

Father argues that the court's findings were erroneous because the evidence did not suggest that Child had been affected by any change in circumstances. However, this argument ignores Father's own testimony that Child needed therapy because she was "confused" and "disturbed" by Mother's new relationship. In any event, "[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, is a sufficient change. It is neither necessary nor desirable to wait until the child is actually harmed to make a change which the evidence shows is required." *Domingues v. Johnson*, 323 Md. 486, 500 (1991).[3]

Father also contends that, even assuming there had been a material change in circumstances, the court abused its discretion in modifying custody. We are not persuaded. "Where modification of a custody award is the subject under consideration, . . . courts generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child." *Karanikas v. Cartwright*, 209 Md. App. 571, 589 (2013) (quoting *Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 419 (1977)). We do not disturb a trial court's custody determination absent an abuse of discretion, which "may occur 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

[3] Father points out that the transcript reflects that the court stated that the parties were living together at the time of the 2013 consent order, which is not true, and argues that the misstatement reflects clear error in the court's material change in circumstances analysis. It appears that the court either intended to refer to the fact that the parties lived close to each other in 2013 and misspoke or that there was an error in transcription. Our review of the transcript as a whole makes clear that the court understood that the parties were not living together in 2013, a fact that was self-evident from the custody arrangement that the parties implemented at that time.

principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Gizzo v. Gerstman*, 245 Md. App. 168, 201 (2020). This deferential standard "accounts for the trial court's unique 'opportunity to observe the demeanor and the credibility of the parties and the witnesses.'" *Id.* (quoting *Santo v. Santo*, 448 Md. 620, 625 (2016)). Consequently, the trial court "is in a far better position than the appellate court, which has only a [transcript] before it, to weigh the evidence and determine what disposition will best promote the welfare of the [child]." *Gizzo*, 245 Md. App. at 201 (quoting *Viamonte v. Viamonte*, 131 Md. App. 151, 157 (2000)).

Child custody determinations "must be made on a case-by-case basis due to the uniqueness of the fact patterns in such disputes[.]" *Petrini v. Petrini*, 336 Md. 453, 469 (1994). "Courts are not limited or bound to consideration of any exhaustive list of factors in applying the best interest standard, but possess a wide discretion concomitant with their 'plenary authority to determine any question concerning the welfare of children within their jurisdiction[.]'" *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 503 (1992) (internal citation omitted) (quoting *Kennedy v. Kennedy*, 55 Md. App. 299, 310 (1983)). "The best interest of the child is . . . not considered as one of many factors, but as the objective to which virtually all other factors speak." *Taylor v. Taylor*, 306 Md. 290, 303 (1986).

In *Taylor*, the Court of Appeals discussed factors that are "particularly relevant to a consideration of joint custody," including: the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; willingness of the parents to share custody; fitness of the parents; the relationship established between the child and each parent; preference of the child; potential disruption of the child's social and school life;

geographic proximity of the parental homes; demands of parental employment; age and number of children; the sincerity of the parents' request; financial status of the parents; the impact on state or federal assistance; and the benefit to the parents. *Id.* at 303-11. The Court emphasized that no one factor "has talismanic qualities, and [ ] no single list of criteria will satisfy the demands of every case." *Id.* at 303.

Here, the court properly focused on the factors relevant to the particular circumstances of this case in modifying physical custody. Specifically, in considering the geographical proximity of the parental homes and the potential disruption to Child's social and school life, the court expressed a concern about the parents sharing custody during the school week due to the distance between their homes. The court concluded that continuation of the shared physical custody arrangement that was incorporated into the 2013 consent order would have a negative impact on Child's ability to keep up with her homework and participate in extracurricular activities, especially because school would be getting harder. The court further determined that a modification of custody was warranted because Child needed "more consistency and structure" during the school week than the "two, three and two" schedule allowed.

Father contends that it was an abuse of discretion for the court to modify custody because, in doing so, the court "completely upended the successful status quo which had been in place for over nine years." As the Court of Appeals has noted, however, while "[t]he benefit to a child of a stable custody situation is substantial," it "must be carefully weighed against other perceived needs for change." *Domingues*, 323 Md. at 500. "[C]hanges brought about by the relocation of a parent may, in a given case, be sufficient

to justify a change in custody. The result depends upon the circumstances of each case." *Id.* The "determinative factor" in evaluating whether a modification of custody is warranted "is what appears to be in the welfare of the children *at the time* of the [custody] hearing." *Azizova v. Suleymanov*, 243 Md. App. 340, 357 (2019) (quoting *Raible v. Raible*, 242 Md. 586, 594 (1966)), *cert. denied*, 467 Md. 693 (2020) (emphasis and alteration added in *Azizova*).

Here, the court applied the relevant *Taylor* factors in determining that continuation of the shared physical custody agreement during the school year did not promote Child's welfare. Based on Mother's move to Randallstown and other considerations, the court concluded that it was in Child's best interest to grant Mother's request for primary physical custody, while maintaining regular contact with Father on most weekends and for four weeks during the summer. Based on our review of the record and the substantial deference we afford to the trial court's custody determination, we do not discern any abuse of discretion in the decision to grant primary physical custody to Mother, with visitation to Father.[4]

Finally, Father contends that the evidence demonstrated that granting primary physical custody to Mother was not in Child's best interest. In support of this contention,

[4] Father's contention that the testimony and evidence weighed in favor of awarding primary physical custody to him instead of Mother is misplaced because Father did not request primary physical custody. To the contrary, Father's position was that shared physical custody pursuant to the existing schedule should not be altered. Accordingly, we do not address that claim. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Father points to evidence that, he argues, the court either ignored or failed to give sufficient weight, including evidence that after Mother moved, she initially did not provide Father with her new address. Additionally, Mother: "attempted to remove" Child from her school, refused to transport Child to activities that Father signed Child up for or that Mother found inconvenient, was prevented by her work schedule from becoming involved at Child's school, failed to notify Father of important matters, and did not communicate with Father "in a mature manner." We discern no abuse of discretion. In making a custody determination, "[t]he fact finder is called upon to 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. Moreover, "[t]he court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor[.]" *Karanikas*, 209 Md. App. at 590 (quoting *Sanders*, 38 Md. App. at 420). Here, the court engaged in a thorough, thoughtful analysis of the evidence presented at the hearing, considered all relevant factors, and made findings of fact based on the evidence. *See Gizzo*, 245 Md. App. at 195-96 ("[T]he court need not articulate every step of the judicial thought process in order to show that it has conducted the appropriate analysis."). Notably, although the court found fault with Mother's behavior in connection with many of the points Father now raises, it found that Father also bore significant responsibility for the breakdowns in the parties' relationship with respect to Child's care. As the court noted, the issue before it was not which parent "has done the worst job," but what was in the best interest of Child. Ultimately, the court determined that Child's best interest would be served by awarding primary physical custody to Mother, and joint legal custody to Mother

and Father.[5] Because Father has not provided any basis on which we could disturb that exercise of discretion, we will affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[5] Father argues on appeal that he sought to modify the shared custody schedule to a "'week-on/week off' schedule as opposed to the '2-3-2' schedule." Father does not cite to the portion of the record where that request was made, nor have we found such a request in our review of the record.