Circuit Court for Baltimore City
Case No. 24D15000250

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2554

September Term, 2019

ROLAND SAND

v.

HEATHER SAND

Graeff,
Nazarian,
Arthur,

JJ.

Opinion by Nazarian, J.

Filed: November 30, 2020

* 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.

Roland Sand ("Father") and Heather Sand ("Mother") divorced in 2016. The Circuit Court for Baltimore City awarded them joint legal custody and shared physical custody of their minor son, A, and gave Mother tie-breaking authority in the event of a disagreement and with regard to A's extracurricular activities. That arrangement has strained over time, though, and both parents filed petitions to modify custody. After a hearing, the court modified the custody and access schedule, modified the tie-breaker authority, and ordered Father to contribute to Mother's attorney's fees. Father appeals portions of the custody and access rulings as well as the attorney's fee award, and we affirm, except as to limitations the court placed on Father's time with A during the summer, which we reverse.

I. BACKGROUND

When Mother and Father divorced in 2016, their Judgment of Absolute Divorce awarded them joint legal custody of A, who was born in December 2009, and gave Mother tie-breaking authority. Mother was awarded primary physical custody, and Father was granted access on all weekends during the school year, except for the third weekend of the month, beginning Friday at 6:00 p.m. and ending Sunday at 6:00 p.m. The access schedule also provided each parent an alternating two-week block with A during the summer. And because Mother had moved from Baltimore to Montgomery County, the order required her to transport A to and from all of his visitation time with Father.

On January 16, 2019, Father filed a Complaint for Modification of Custody. He sought sole legal custody, and he also asked that the court order Mother to provide him with A's passport. Mother filed a Counter-Motion to Modify Custody that sought a

modification of legal custody and a change to Father's access schedule; she later amended her motion to include a request to modify child support. Although they sought different results, both parents had to contend, and did contend, in their complaints that there had been a material change in circumstances since the original custody and access decisions.

The court held a hearing on the motions on October 28, 2019. The court heard testimony about how Father had relocated closer to Mother, about Father's work schedule, especially on weekends, and about the communications and logistical challenges surrounding A's extracurricular activities. Father testified that during his weekends with A, particularly on Saturdays, he took A to work with him in the morning until his workday ended (usually between noon and 2:00 p.m.).

Mother testified about communication issues between her and Father, especially in connection with A's activities. She said that Father often failed to respond to the court-ordered weekly e-mail correspondence about A and that if he did respond, in her opinion, the e-mails came too late or were unhelpful. She testified that she emailed "[Father] in May of [2018] about [A's] Cub Scout ceremony where he would be getting awards, and it fell on . . . one of [Father's] weekends." When asked to take the child, he responded "No, sorry. Again, this is a consequence of you moving far away. He won't be attending." Father testified that because Mother had moved to Silver Spring with A after they separated, he should not have to share driving responsibilities. Mother testified that decisions about A's extracurricular activities were dominated by disputes around scheduling, who would do the driving, and whether the activity would cut into one of the parties' time with the child.

On December 5, 2019, the court resolved the motions in a Memorandum for Modification of Custody and Attorney's Fees and accompanying Order. The court began the ruling section of the Memorandum by noting that "both parties contend that there has been a substantial change in circumstances which warrant a change in the legal custody of the minor child," and on the record, the court agreed: "Based on the evidence and testimony presented, this Court finds that there has been a substantial change in circumstances that might warrant a complete change of legal custody pursuant to the previous court orders . . . ." Even so, the court found that a structural change to the overall legal custody arrangement would not be in A's best interests. Instead, the court found "a substantial change in circumstances that warrants a modification of the tie-breaking authority and current child access schedule to be in the minor child's best interest to better balance the quality and amount of time the minor child spends with each parent and cut down on the tension and conflict between the two."

The court then made changes to the access schedule and terms that focused on the points of greatest tension around the child's extracurricular activities, transportation, time spent at the animal hospital, and communication. Father's overall access time stayed about the same, but was structured a little differently. Under the new schedule, Father would pick A up from school on Friday afternoons on his first and second visitation weekends and on those weekends Mother would pick him up from Father's home on Sundays at 6:00 p.m. On the fourth weekend of the month, Mother would drop A off with Father on Saturday at 3:00p.m., and Father would return him by taking him to school on Monday morning or, if

school is closed, to Mother's house. In the court's words, "[t]his modification allows [Father] to maintain [the] same amount [of] overnights during the weekends and gets additional time on Friday afternoon and Monday morning to spend with the minor child on the third visitation weekend," while accommodating A's activities. The court also modified the tie-breaking authority which, to that point, had been held entirely by Mother. Mother retained the tie-breaker during the school year, but the court shifted it to Father during summer break. During the summer, Father is required to send Mother weekly emails about A to which Mother is required to respond in a timely manner.

The court then limited the time A could spend at Father's workplace during the summer break visitation. After finding that "it is not in the best interest of the minor child to go to work with [Father] as often as he has been," the court ordered "that if [Father] must work during that period he has access to the minor child, [he] shall enroll the minor child into a day camp or find other child care arrangements for at least three (3) of those days per week or the equivalent thereof." In the accompanying Order, the court stated this same modification in slightly different words:

> [D]uring the summer school break months when the minor child is in the custody of [Father], the minor child is only permitted to go to [Father's] employment not more than three (3) days per week or the equivalent thereof and shall otherwise be enrolled in a day camp or similar activity on days when [Father] must work . . . .

Finally, the court analyzed Mother's request for attorney's fees, awarded her $2,000, and, based on a discovery violation, denied Mother's request to modify child support Father filed a timely appeal. We supply additional facts as necessary below.

II. DISCUSSION

Father's brief raises four issues,[1] but they collapse readily into two. *First,* Father raises various challenges to the court's decisions to modify the access schedule. And *second*, Father argues that the circuit court abused its discretion in awarding attorney's fees to Mother. Overall, the court's resolution of the parents' largely intractable access disputes

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[1] Father phrased his Questions Presented as follows:

> 1. Did the lower court err by modifying the child access schedule on clearly erroneous fact finding and no significant changes in circumstances that affected the welfare of the child?
>
> 2. Did the lower court err by making inconsistent rulings on restrictions and limitations on Father's access time between its Memorandum for Modification of Custody and Attorney's Fees and its Order?
>
> 3. Did the lower court abuse its discretion by restricting Father's right to decide and direct the day to day decisions for the minor child while in his custody by limiting the number of days the minor child may accompany him to his place of work and imposing enrollment in camp, activities and/or childcare?
>
> 4. Did the lower court abuse its discretion and commit legal error by failing to consider all factors necessary before making an award of attorneys' fees?

Mother re-phrased the Questions Presented in her brief:

> 1. Whether the Trial Court abused its discretion in modifying physical custody?
>
> 2. Was it an abuse of discretion when the Trial Court provided terms to the custody order that limited [A] time at Appellant's workplace?
>
> 3. Did the Circuit Court Err in Awarding Appellee Attorney's Fees?

and the attorney's fee award fell well within its discretion, with one exception: the limits the court placed on the time the child could spend with Father at his veterinary practice.

A. The Circuit Court Did Not Abuse Its Discretion In Resolving All But One Of The Disputes Regarding The Access Schedule And Tie-Breaking Authority.

When determining whether to modify custody, "a trial court employs a two-step process: (1) whether there has been a material change in circumstances, and (2) what custody arrangement is in the best interests of the children." *Santo v. Santo*, 448 Md. 620, 639 (2016); (*citing In re Deontay J.*, 408 Md. 152, 166 (2009)). "A change in circumstances is "material" only when it affects the welfare of the child." *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). And when considering a child's best interests, reasonable exposure to each parent is presumed to be in the best interest of the child. *Boswell v. Boswell*, 352 Md. 204, 214 (1998).

Father begins, in his first Question Presented, by challenging the circuit court's threshold finding that material changes in circumstances justify a change in legal custody and the access schedule. This is a curious starting point since Father himself, in Paragraph 2 of his complaint that initiated this custody modification proceeding, alleged that "[s]ince the entry of the last order regarding custody, there have been material changes in circumstances that require the court to revisit and modify its decision regarding Joint Legal Custody." Mother agreed, and the circuit court grounded its finding on this point to the parties' unanimous allegations that the *status quo* wasn't working and that the terms needed to change. To be clear, the parties disagreed about which areas of dispute were most salient

and about how and to what extent the terms should change. But those disputes don't affect their agreement that this initial burden was satisfied, or the court's finding in that regard, and Father can't now challenge the court's reliance on his own allegation.

From there, Father argues that the court abused its discretion in modifying the access schedule. We review these contentions using a three-step analysis:

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

Jose v. Jose, 237 Md. App. 588, 589 (2018) (*quoting Wagner v. Wagner*, 109 Md. App. 1, 39-40 (1996)). A court is deemed to have abused its discretion "where no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding principles." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007) (cleaned up) (*quoting Wilson v. John Crane, Inc.*, 385 Md. 185, 198–99 (2005)). "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). "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.'" *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (*quoting Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)).

After disentangling Father's arguments about the material change finding, he takes issue with two specific changes the court made to the schedule. *First*, Father argues that the court's modification to the weekend schedule "did not remedy the issue it claimed it was addressing: to accommodate the minor child's Saturday morning activities." Father claims that the new schedule "created an untenable situation for Father and the minor child," that the extent and timing of the transportation required under that schedule is not in A's best interests. On this point, we disagree.

To establish an access schedule, the court must engage in a quintessential factual exercise. Once the court gets past the initial questions about whether and to what extent to share custody, the details depend on the intensely personal and logistical circumstances of the particular parties. We don't doubt that the logistics here are challenging, and given where these parents live, any shared custody schedule is going to require a lot of driving on heavily trafficked and often unpredictable roadways. But the circuit court heard and weighed all of the testimony about the changes in the driving distance between the parties' residences, the tension surrounding Father's access time, the child's increasing participation in extracurricular activities, the amount of time the child spends at Father's veterinary practice, the parents' disputes over vacation travel, and their difficulties in communicating about extracurricular and daily activities. The court heard both parents' views on how these issues bore on A's opportunities to participate in activities and affected his time with one parent or the other. After considering the particular circumstances of both parties, including A, the court reconfigured the access schedule in a manner designed to

improve the overall situation consistent with A's best interests. There were no obvious or easy solutions here—the commute between the parents' houses, while improved, is still difficult. As A gets older, his activities could require more time and coordination. Father emerged from this litigation having more time with A and tie-breaking authority that he did not have before, but also gained a share of the transportation burden he had not borne previously. The court made the change in order to "allow [Father] to spend additional time with the minor child and equalize the transportation burden on both parties." We cannot say that the circuit court's solution here, however imperfect, represents an abuse of its discretion.

Second, Father objects to the court's limitation on the amount of time A can spend with him at his veterinary office during his summer visitation time which requires Father to enroll him in camp or day care instead. We agree that the court abused its discretion in this one regard, and we reverse this component of the judgment.[2]

We start from the premise that Father (and Mother, of course) have a constitutionally protected right to parent their child. *In re Adoption/Guardianship Nos. J9610436 & J9711031*, 368 Md. 666, 671(2002); s*ee Troxel v. Granville*, 530 U.S. 57, 66

[2] Father contends that differences between the Memorandum's description of this condition, which phrases it in terms of requiring him to enroll A in day care or camp three days a week, and the Order's description, which limits A's presence at Father's work to three days a week, render these decisions fatally inconsistent. It's true that the two documents state the condition differently, although it's not obvious that there is any discrepancy. Father testified that he frequently worked Saturdays, so he could well have to plan care or activities for A for six days of a summer week, working Monday through Saturday. Nevertheless, our holding on this issue obviates any need to resolve it.

(2000) (stating "the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"). "'Such rights are so fundamental that they cannot be taken away unless clearly justified.'" *In re R.S.*, 470 Md. 380, 413 (2020) (*quoting In re Billy W.*, 386 Md. 675, 684(2005)). The right to parent is not absolute, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("[F]amily itself is not beyond regulation in the public interest . . . nor rights of parenthood are beyond limitation".) (*citing Reynolds v. United States*, 98 U.S. 145), and yields in situations where the state exercises its "generally recognized power to protect the child." *McDermott v. Dougherty*, 385 Md. 320, 355 (2005). But "a non-custodial parent has a 'reasonable' right to liberal visitation with his or her child." *Jose v. Jose*, 237 Md. App. 588, 604 (2018); (*citing Myers v. Butler*, 10 Md. App. 315, 317 (1970)). And the state can't interfere in parenting decisions, or place restrictions on or deny visitation, until the parent first is found to be unfit or that exceptional circumstances are present, or if the child faces a threat to their health or welfare. *In re Yve S.*, 373 Md. 551, 570 (2003) ("[V]isitation may be restricted or even denied when the child's health or welfare is threatened."). Otherwise, "there is a strong presumption in favor of maintaining parental rights to serve the child's best interests." *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 300 (2005).

Father is a fit parent who has shared physical custody with Mother, and there is no suggestion otherwise; to the contrary, the court found that A "is basically thriving under the present shared physical custody arrangement," and the changes to the access schedule were meant only to improve the situation overall. The testimony on the subject of A

spending time at Father's work was mixed—Father believed it was good for him because A was interested in animals and time at the veterinary office gave them opportunities to bond, whereas Mother expressed concerns that he was spending too much time there and was bored. But there was no evidence that spending time at the office with Father had caused A any potential harm, that the office was an inappropriate place for children his age, or that going to work with Father posed any threat to A' health or safety. The differences represented variation between the parents in how Father should best spend his allotted time with A. The decision to limit Father's ability to bring A to the office unduly limited Father's discretion as a parent. It is not enough that Mother would prefer that Father send A to camp or find alternative arrangements—when A is with Father, Father has the right to make the day-to-day parenting decisions he thinks best. Placing this limitation on Father's summer parenting decisions also seems inconsistent with the court's decision to give Father tie-breaking authority over joint-parenting decisions during the summer months. In the absence of some more concrete basis to find that time at the animal hospital posed a threat to A's health or safety, the court abused its discretion in imposing this restriction on Father's right to parent. We reverse this one element of the court's modified custody and access order and affirm the remainder of the court's custody and access decisions.

B. The Circuit Court Did Not Err In Awarding Attorney's Fees To Mother.

Finally, Father argues that the circuit court abused its discretion and committed legal error by awarding attorney's fees to Mother based on what he characterizes as an

incomplete analysis of the factors prescribed in Section 12-103 of the Maryland Code Family Law Article. Subsection (b) of this statute requires courts, before awarding attorney's fees in family law cases, to consider: "(1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b). Although the court must consider the statutory criteria, it "does not have to recite any 'magical' words so long as its opinion, however phrased, does that which the statute requires." *Horsley v. Radisi*, 132 Md. App. 1, 31 (2000) (*quoting Beck v. Beck*, 112 Md. App. 197, 212 (1996)). The decision to award fees and costs "will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (*citing Danzinger v. Danzinger*, 208 Md. 469, 475 (1995)).

We see neither legal error nor any criteria left out. The circuit court began by noting that it had considered the parties' relative finances previously, most recently in connection with contempt proceedings that resulted in a decision not to award fees to Mother. As such, the court's analysis built on its previous analyses rather than starting from scratch. To be sure, the court relied on the considerable difference between the parties' income. Father argues that looking at income alone yields an incomplete analysis of a party's true financial status and gestures broadly at cases describing financial statues in terms beyond mere income. *See, e.g.*, *Bagley v. Bagley*, 98 Md. App. 18, 40 (1993). But income is *not* all the court considered: in addition to salaries, the court relied on the fact that Father had incurred $11,818 in attorney's fees, and Mother had incurred $10,236. There is no suggestion in this

record that the financial circumstances of these parties are complicated enough to require a deeper dive. And in any event, "a trial court does not have to follow a script," *Durkee v. Durkee*, 144 Md. App. 161, 185 (2002), and is "thus [ ] not required to set out in intimate detail each and every step in his or her thought process." *Kirsner v. Edelmann*, 65 Md. App. 185, 196 n. 9 (1985). These data points painted an adequate picture of the parties' relative financial status.

Second, although it did so essentially simultaneously with considering their financial status, we can see in this record that the court did consider the financial needs of each party. Again, the court built on its findings from earlier stages of this case, *see Meyr v. Meyr*, 195 Md. App. 524, 554 (2010), and made the same connections between the parties' income and the fees they had incurred. The court's discussion was short, but it did assess the parties' relative financial need based on testimony from each about their income and fees, and the court found that Mother had a greater need for the award of attorney's fees than Father.

Third, the court also considered the parties' justifications for prosecuting and defending the proceedings. Father contends that the court's analysis of each party's justifications for bringing, maintaining, or defending the proceeding is contradictory, but we see it as a candid assessment of each parent's relative justification and success. The court found specifically that both parties had a substantial justification for prosecuting and defending this proceeding, and although Mother was not entirely successful in defending the case, she prevailed substantially and that the amount of her attorney's fees was

attributable at least in part to opposing the "aggressive actions" of Father, which themselves were justified at least in part. Neither side won their claims *in toto*, and neither litigated the case in bad faith, but the court decided on this record that Father should pay not quite half of Mother's attorney's fees. The court considered the statutory factors and reached a decision that was neither arbitrary nor clearly wrong.

Finally, and although FL § 12-103 "does not expressly mandate the consideration of reasonableness of the fees, this Court and the Court of Appeals have indicated that evaluation of the reasonableness of the fees is required." *Sczudlo v. Berry*, 129 Md. App. 529, 550 (1999). Reasonableness is evaluated using factors such as labor, skill, time, and benefit to the client. *Petrini*, 336 Md. at 467 (*citing Brown v. Brown*, 204 Md. 197, 213 (1954)). And here, the court noted that Mother's legal fees were reasonable based on the defensive position she was forced to take, that Father "caused [her] to incur justifiable attorney fees to appropriately pursue her claims in this matter and/or defend against his actions." The record included counsel's affidavit detailing the time, labor, and tasks comprising Mother's attorney's fee request, to which Father lodged no substantive objections in the trial court or here, and we see no abuse of discretion in the court's decision to award Mother $2,000 toward her attorney's fees.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND REVERSED IN PART. COSTS ASSESSED 67% TO APPELLANT AND 33% TO APPELLEE.