UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1470

September Term, 2014

ROCHITA JACKSON F/K/A
ROCHITA DUNN

v.

JAMES DUNN

Kehoe,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: July 7, 2015

Rochita Jackson f/k/a Rochita Dunn, appellant, appeals an Amended Order which transfers primary physical custody of the parties' two minor children, Asiana Dunn ("daughter") and James Dunn, III ("son") to appellee, James Dunn, Jr.

In March 2014, appellee filed a motion for modification of primary physical custody in the Circuit Court for Prince George's County. The court held a hearing on July 10, 2014, and scheduled a second day on August 20, 2014, in order to complete the hearing. Subsequently, the court granted father's motion to modify physical custody, which appellant timely appealed.[1]

Perceiving neither reversible error nor abuse of discretion, we shall affirm.

FACTUAL BACKGROUND

Married on March 13, 1998, the parties have a daughter, born in December 1997, and a son, born in May 2002. After appellant initially filed a divorce complaint in August 2008, a judgment of limited divorce was entered in October 2008. On April 8, 2010, the parties entered a parenting plan agreement settling all matters relating to the minor children, and on August 26, 2010, the court entered a judgment of absolute divorce. Pursuant to this

[1]In her brief appellant presents the following question, which we quote:

Did the Trial Court err in modifying custody where the Trial Court: 1) did not conduct a home study to determine where Appellant lived after deciding a home study was necessary, 2) refused to interview Asian Dunn because of the judge's own experience as a 16 year old with his parents' custody litigation after both parties suggested he do so, 3) allowed evidence of domestic violence and criminal conduct to be admitted after the close of evidence, 4) made no finding of material change of circumstances, 5) made no factual determinations, 6) made no credibility determinations, 7) failed to analyze the factors that a trial court should consider in making a custody determination, and 8) did not state why the best interests of the children were served by modification of custody?

judgment, the parties were awarded joint legal custody and appellant retained primary physical custody of the two minor children in the marital home, in accordance with the parenting plan agreement.

In May of the following year, appellee filed a motion for modification of custody seeking primary physical custody of the children. In 2012, the court entered a consent order which continued physical custody with their mother, but also provided child responsibilities for, and at the home of, their maternal grandmother, Sue Jackson.

During 2012-13, appellant entered into a personal relationship with Douglas P., for whom she rented an apartment. This relationship was infested with domestic violence and appellant obtained a civil protective order against P. He repeatedly violated the order, and appellant swore out charges for a violation of the protective order several times.

In 2013, appellant also had domestic difficulties with Ronald M., referred to in the record as a long-time boyfriend, a fiancé, and a roommate, who lived in the parties' marital home after their divorce. As the result of domestic violence, appellant also obtained civil protective orders against M., which were later rescinded.

In January 2014, the parties voluntarily agreed to a short-term measure by which the children would reside with their father, appellee. At this time, he was living with his fiancée and her two children, a girl and boy similar in age to the parties' daughter and son. On March 19, 2014, appellee filed a motion to modify custody, asserting material change that warranted a modification of physical custody and child support. According to appellee:

> By agreement of the parties, the minor children came to reside with [him] in December of last year and they have changed their school enrollment to his neighborhood. Previously the children were living with the [mother] in the marital home located in Clinton but due to serious discord and domestic violence between the [appellant] and her fiancé, a Final Protective Order was issued which resulted in the [appellee] and the minor children being ordered to move out of the house.
>
> It is in the best interest of the children that they continue to reside with the [appellee] because he provides a stable home and environment. The children are happy and well-adjusted and want to continue residing with [him]. At the time of the previous custody orders the [appellee] was working night shifts for Metro preventing him from properly caring for the children. He now works a regular day shift. In addition, the [appellee] is in a stable relationship with his fiancée and has been for years and the children are comfortable with her and the [father]'s household.

On May 7, 2014, appellee filed an emergency motion for *pendente lite* custody, alleging that appellant had taken physical custody of the children and removed the children from their school near his home just six weeks before the end of the school year. After determining that the matter was not an emergency, a master scheduled a full-day custody modification hearing for July 10, 2014.

The court heard considerable testimony by the parties, family members, and friends regarding each of the parties' roles as parents, their relationships, experiences, and abilities to properly care for the children, who were then ages 16 and 12. The evidence included testimony regarding appellant's domestic violence orders against P. and M. Concerned with this testimony, the court ordered a home study in order to assist it in determining "who is living where and under what circumstances." It was suggested by counsel that the trial court interview one or both children, given that they could be directly questioned regarding the

parents' living conditions. However, neither party called either of the children as a witness, leaving the matter entirely to the court's discretion.

After the interview suggestion was made, the following colloquy took place:

> THE COURT: I am concerned about it, and I can tell you that, in this very courthouse, at age 16, I was in one of those witness boxes. It wasn't all that comfortable, I can tell you.
>
> [Appellee's atty]: I wasn't asking for the witness box at all, just –
>
> THE COURT: Well, no, but the fact –
>
> [Appellee's atty]: - - in chambers.
>
> THE COURT: - - that the child gets called to the judge's chambers is something that's still with me, you know, a long time, decades later.
>
> * * *
>
> I would prefer to minimize the trauma to everybody.
>
> [Appellee's atty]: Yeah.
>
> THE COURT: I - - I keep using the word tumultuous. I can't think of another word, but tumultuous. In any event, make the arrangements, get the order to me, and we'll set it back in for the closing argument.

The court ordered that a home study be conducted prior to the resumption of their hearing.

On July 30, 2014, the court issued a written consent order regarding the home study, providing that the home study be conducted by an attorney from the court's approved list of mediators, who would visit appellant's former marital home in Clinton as well as her apartment in Temple Hills, interview the minor children, review the protective orders and allegations in the domestic violence cases involving appellant, P. and M. The consent order

also provided that the final custody hearing would resume on August 20, 2014, a date which would provide ample time for investigation but preceded the beginning of a new school year.

Counsel for the parties selected Donna Frederick, Esq. from a list of approved mediators to conduct the home study. However, after it was scheduled, appellant discovered through the internet that the mediator and appellee's counsel shared the same business address, and was concerned that they worked together. As a result, when Frederick arrived at appellant's home, although allowed to observe the home, appellant did not permit her to interview either of the two children. In addition, appellant filed a motion for continuance of the home study, based upon an alleged conflict of interest prior to the resumption of the August hearing.

When the custody modification hearing resumed on August 20, 2014, the court began by discussing the motion to continue and the alleged conflict of interest. Counsel explained that, although the court had initially ordered that someone from family services conduct the home study, that arrangement had not been possible because of summer staffing shortages and the parties' time deadlines. As a result, they had agreed to use Frederick for the home study, whom neither knew to work in the same firm as appellee's counsel. According to counsel for appellee, Frederick's only contact was that she rented office space to conduct her mediation practice.

Considering appellant's objection in light of the parties' need to promptly resolve the custody issue, the trial court chose not to consider the truncated home study. Rather, it relied on the evidence already before the court, and took judicial notice of the court records regarding the domestic violence claims appellant had filed against P. and M. Appellant offered to have her daughter testify, if the court "would like to speak to her," but the court indicated that there was sufficient evidence before the court. The court further noted that his personal experience testifying as a 16 year-old had "left a mark on me I'll never forget."

The court made an oral determination to grant appellee's motion for custody modification, which continued the parties' joint legal custody but transferred physical custody to appellee, with reversed visitation rights. The court explained that, based on all of the evidence, his conclusion was that it was not in the best interests of the children to continue living primarily with their mother. Noting that the matter needed to be resolved prior to the beginning of a new school year, the court stated as follows:

> I'm going to change custody. I think that [appellant's] dealing with the reality of what's going on and the violent nature of her friends in the home are not in the best interests of the children.

The court stated:

> She has relationships with men that are -- often lead to violent encounters, and I don't think that's in the best interest of the children.

When asked for further detail, the court, citing the Court of Appeals in *Taylor*[2] and this Court in *Montgomery County v. Sanders,* 38 Md. App. 406, 420 (1978), referenced the following factors:

> A, the fitness of the parents; B, the character and reputation of the parties; C, the desire of the natural parents and the content of any agreement between them; D, the potentiality of maintaining natural family relations; E, the preference of the child, at least when the child is a sufficient age and the capacity to form a rational judgment; F, any material opportunities affecting the future life for the child; G, the age, health and sex of the child; H, the suitability of all the residents, as the parents, and whether the non-custodial parent will have adequate opportunities for visitation; I, how long the child has been separated from the natural parent who is seeking custody, and J, the effect of any prior and voluntary abandonment or surrender of custody of the child.

The court then explained that, to the extent possible, he had "considered each and every one" of these factors. He noted that he did not "want to hurt anybody's feelings anymore than I have, but that is the order of the Court."

On September 2, 2014, the court entered a written order consistent with its ruling, and an order was entered on September 3, 2014, which added a line to clarify school placement for the children.

DISCUSSION

Appellant argues that the court abused its discretion by determining that custody modification was in the best interest of the minor children, basing her argument upon several alleged errors. She asserts that the trial court: (a) failed to conduct a home study

[2] *Taylor v. Taylor,* 306 Md. 290, 303 n.10 (1986)

after initially ruling that one was necessary; (b) declined to interview the children based upon the judge's own experience; (c) considered the domestic violence petitions filed by mother; (d) failed to make an express finding of a material change in circumstances; (e) failed to make detailed factual or credibility determinations; (f) made no credibility determinations; (g) failed to analyze factors that a court should consider in making a custody determination; and (h) did not state why modification of custody was in the best interests of the children.

In support of the court's ruling, appellee provides a point-by-point refutation of each of appellant's arguments, and concludes that the court "properly considered the testimony and evidence presented which clearly supported its determination that it was in the best interest of the minor children that physical custody be awarded to the Father."

We have long recognized that "there is no such thing as a simple custody case," comparing such cases to "fingerprints because no two are exactly the same." *Montgomery County v. Sanders*, 38 Md. App. 406, 414 (1978) (citation and quotations omitted). "The court of equity stands as a guardian of all children, and may interfere at any time and in any way to protect and advance their welfare and interests." *Id*. at 418 (citation and quotations omitted). A party seeking to modify custody must establish that the modification is necessary to safeguard the welfare of the child. *Shunk v. Walker*, 87 Md. App. 389, 398 (1991). In all custody cases, the judge "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. At the bottom line, what is in the child's best interest equals the fact finder's best guess." *Karanikas v. Cartwright*, 209 Md. App. 571, 589-90 (2013) (citation and quotations omitted).

Maryland courts have provided a list of major factors that should be considered in making custody determinations, keeping in mind that "'none has talismanic qualities and that no single list of criteria will satisfy the demands of every case.'" *Reichert v. Hornbeck*, 210 Md. App. 282, 305 (2013) (quoting *Taylor v. Taylor*, 306 Md. 290, 303 (1986)). "These factors include:

> '[A]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rationale choice, the preference of the child.'"

Id. (quoting *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996)). "The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all others factors speak." *Taylor*, 306 Md. at 303; *Reichert*, 210 Md. App. at 305.

When dealing with a custody modification case, the circuit court must first assess whether there has been a "material" change in circumstance. *See Wagner*, 109 Md. App. at 28. "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." *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005) (citing *Braun v. Headley*, 131 Md. App. 588, 610 (2000)).

Considering a modified custody case, "we first consider whether the trial court erred in finding that a material change in circumstances occurred," and then "we consider whether the court abused its discretion in modifying custody." *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). A "material change in circumstances" is one that may affect the welfare of the children. *Id*. at 171. "'The burden is then on the moving party to show that there has been such 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 for custody to be changed.'" *Id*. at 171-72 (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)).

In our appellate review of child custody decisions, a trial court's findings that a moving party has satisfied its burden and established a justification for change in child custody must be accorded great deference by this Court. *Braun v. Headley*, 131 Md. App. 588, 597 (2000). "The determination of which parent should be awarded custody rests within the sound discretion of the trial court[,]" as guided by the court's belief regarding what would be most likely to promote the best interests of the child. *Id*. at 596. "Additionally, the trial court's opportunity to observe the demeanor and credibility of both the parties and the witnesses is of particular importance." *Id*. at 597 (citing *Petrini v. Petrini*, 336 Md. 453, 470 (1994)). In *Reichert*, *supra*, we emphasized that the following:

> [T]he reviewing court gives "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." Further, we acknowledge that "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only [it]

> sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [it] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor" child.

210 Md. App. at 304 (quoting *In re Yve S.*, 373 Md. 551, 584-86 (2003) (internal citation omitted)). Appellate courts "may not set aside the factual findings of the chancellor unless they are clearly erroneous, and absent a clear showing of abuse of discretion, the decision of the trial judge in a custody case will not be reversed." *Sanders*, *supra*, 38 Md. App. at 419 (citing *Davis v. Davis*, 280 Md. 119 (1977), *reversing* 33 Md. App. 295 (1976)).

When ruling in a custody case, as here, a court's statement that it has considered "all matters" may be considered sufficient. We recall Judge Barbera's opinion that a "judge is not required to 'set out in intimate detail each and every step in his or her thought process.'" *Marquis v. Marquis*, 175 Md. App. 734, 755 (2007) (quoting *Kirsner v. Edelmann*, 65 Md. App. 185, 196 n. 9 (1985)). Trial judges are presumed to know the law and to apply it properly. *Id*.; *Jordan v. Jordan*, 50 Md. App. 437, 443, *cert. denied*, 293 Md. 332 (1982). As a result, "we presume judges know the law and apply it 'even in the absence of a verbal indication of having considered it.'" *Marquis*, 175 Md. App. at 755 (quoting *Wagner v. Wagner*, 109 Md. App. 1, 50, *cert. denied*, 343 Md. 334 (1996)). For example, the court is not required to "give a litany of its reasons for accepting and adopting the fact finding, conclusions, and recommendations of the master." *Id*. (quoting *Kierein v. Kierein*, 115 Md. App. 448, 455-56 (1997).

In the case *sub judice*, the trial court reached its determination only after hearing a considerable amount of testimony from both parties and their witnesses regarding the circumstances of the family members and what factors had changed since the court's prior custody order. After hearing testimony regarding the violent nature of appellant's male companions and the incidents which had led to her seeking of repeated protective orders against them, the court opined that residing among such "trauma" was not in the children's best interest. The court further opined that appellant's tendency to have relationships with men which lead to violent encounters was not in the best interest of the children. The court's opinion was further confirmed after viewing court documents in which appellant described the incidents when seeking civil protective orders.

Also before the court was testimony regarding how repeated residential moves and school transfers were not in the children's best interest, leading to a lack of stability and worsening of grades. There was testimony that the children were bonding well in the home of their father, who lived with his fiancée and her two children, a girl and a boy who were similar in age to daughter and son, and who were enrolled in the same schools and involved in many extracurricular activities together. Decisions regarding child custody are governed by the best interest of the child. *Gordon v. Gordon*, 174 Md. App. 583, 636 (2007).

a. Lack of home study.

Appellant's argument that the trial court erred in its custody modification is based on a number of issues regarding the manner in which it conducted its hearing and issued its

order. First, she contends that it was an error for the court to alter its initial order that a home study was needed. However, a home study is not required unless a court is "sorely lack[ing] the ingredients necessary" to enable it to make a reasoned decision. *See, e.g.*, *Snow v. Watson*, 240 Md. 712 (1965). Here, the court had sufficient evidence from the July 10, 2014 hearing, but had requested a home study in order to provide additional information regarding appellant's civil protection cases and to verify an issue of credibility.

Although initially consenting to Frederick's role as designated mediator for the home study, it was appellant who then objected to her involvement, seeking a postponement of the home study. In light of the children's pending school schedule and their need to maintain stability, the court denied the postponement, determining that it had sufficient evidence with which to make a proper decision. We find no error.

b. No interview of minor children by trial court.

Appellant's second argument is that the court refused to interview either child, particularly the 16-year-old daughter, based on the court's personal experiences. However, neither party called the children as witnesses, expressly leaving the matter of interviewing a child to the discretion of the court. The court declined to do so, and relied on the substantial evidence, including testimony from witnesses regarding the preferences of the children. The court further noted its concern that any value deduced from a child interview would come at a cost that was sure to exceed its value, and determined that such a cost would not be in the best interest of the children.

"'In disputed custody cases, the court has the discretion whether to speak to the child or children and, if so, the weight to be given the children's preference as to the custodian.'" *Karanikas*, 209 Md. App. at 590 (quoting *Leary v. Leary*, 97 Md. App. 26, 36 (1993)). Because the court was under no legal requirement to interview either minor child, and had ample evidence regarding their preferences from witness testimony, the court did not abuse its discretion by declining to conduct a child interview.

c. Consideration by court of appellant's domestic violence petitions.

Arguing that the trial court erred by taking judicial notice of appellant's domestic violence petitions, appellant maintains that this evidence "was both submitted after the close of evidence and contained multiple levels of hearsay." We first note that the hearing was continued, not concluded, by the court at the conclusion of the July hearing, which was done in order to allow the court to obtain further information. The court did so, taking judicial notice of the additional information regarding appellant's numerous domestic violence petitions, appellant is incorrect to object that the hearing had been concluded.

Appellant's claim that the court incorrectly considered evidence excluded by the rule against hearsay is unfounded. When considering the domestic court records, the court did not err by taking note of appellant's statements in the petitions for civil protection which set forth and described the endangering acts by P. and M. Pursuant to Maryland Rule 5-803(a)(1), statements by a party are exempt from the rule against hearsay. Trial judges are presumed to know the law and apply it properly. *Jordan*, *supra*, 50 Md. App. at 443. In

light of this presumption, we therefore presume that upon review of these petitions, the court was able to determine which, if any, statements, were hearsay, and to only consider the admissible evidence. As a result, the court did not err.

d. Material change of circumstances.

Appellant claims that the trial court "made a plainly arbitrary or clearly erroneous determination to modify custody" because its only finding of change in circumstances concerned appellant's domestic turbulence with P. and M. in prior years, but did not expressly state that these were material changes which affected the best interest of the children. Although appellant acknowledges the existence of domestic turbulence in her household, she claims to not comprehend how, for a child to live in such a household, rather than a stable, secure household, would constitute a material change that would not be in the child's best interests. The court expressly stated, on more than one occasion, that living in such a "turbulent" household was not in the best interest of the children. In addition, the trial court expressly articulated that, to the extent possible, it had considered "each and every one" of the following factors set forth by this Court in *Sanders*, *supra*:

> -fitness of the parents;
> -character and reputation of the parties;
> -desire of the natural parents and the content of any agreements between them;
> -the potentiality of maintaining natural family relations;
> -any preferences of the children;
> -any material opportunities affecting the future life for the children;
> -the age, health and sex of the children;
> -suitability of all residences of the parents, and whether non-custodial parent will have adequate opportunities for visitation;

> -how long the children have been separated from natural parent seeking custody; and
> -the effect of any prior and voluntary abandonment or surrender of custody of the children

38 Md. App. at 420. According to appellant, the trial court's ruling must be reversed as plainly arbitrary or clearly erroneous, based upon the fact that the court did not articulate a longer, more personalized list of reasons setting forth his rationale for the modification of primary custody. However, when issuing his order, the court expressed a clear reason for his manner in doing so, stating: "I don't want to hurt anybody's feelings anymore than I have[.]"

A trial court which states that it considered "all matters" in reaching its custody ruling must plainly be doing so in the best interests of the children. There is no requirement that the judge "set out in intimate detail each and every step in his or her thought process." *Marquis*, 175 Md. App. at 755. Where the record makes plain that the trial court reached its decision with the best interests of the children as its clear goal, and where the record is not lacking in evidence to sustain such a decision, then the trial court's ruling shall be granted deference by this Court. We affirm the court's judgment modifying primary custody from appellant to appellee.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.