

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Nos. 606, 1510, & 1978

September Term, 2016

MARIO TERELL FOREMAN

v.

LESLIE ANN WILLIAMS

Eyler, Deborah S.,
Beachley,
Shaw Geter,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 9, 2017

This appeal stems from a custody dispute between Mario Terrell Foreman (“Father”), the appellant, and Leslie Ann Stewart, f/k/a Leslie Ann Williams (“Mother”), the appellee, after Mother decided to relocate from Maryland to Ohio along with the parties’ then 4-year old daughter, Chloe. At the time of Mother’s planned relocation, the parties shared legal custody of Chloe, with Mother having primary physical custody and Father having alternate weekend visitation.

Father noted separate appeals from three orders entered by the Circuit Court for Montgomery County. The first order dismissed his motion to modify child support. The second order terminated an emergency custody order that had granted Father sole legal and physical custody; modified legal custody to grant Mother tie-breaking authority; and modified Father’s access to grant him summer and holiday access instead of alternate weekend access. The third order granted Mother’s emergency motion for immediate child custody. The three appeals have been consolidated in this Court.

Father asks three questions, which we have rephrased:

- I. Did the circuit court err by dismissing his motion to modify child support?
- II. Did the circuit court err by modifying custody because there had been no material change in circumstances since the entry of the prior custody order?
- III. Did the circuit court deny Father his due process rights by granting Mother’s emergency motion for immediate child custody?

For the following reasons, we answer the first question in the affirmative and the latter two questions in the negative and shall affirm in part and reverse in part the orders of the circuit court.

FACTS AND PROCEEDINGS

Mother and Father have never been married. They dated for four or five months but broke up prior to Chloe's birth. Chloe is now 5 years old.

Father works as a cyber-security consultant. He is married and has a 7-year-old daughter from a prior relationship, who lives with him part of the time under a shared custody agreement.

Mother is a registered nurse. She works for a pharmaceutical distribution company "generat[ing] letters of medical necessity when an insurance company has denied payment for a medication." The company has multiple offices, including in Rockville, Maryland and in Ohio. Mother has two children from prior relationships, a son, who is now over 18, and a 14-year-old daughter. Her older daughter lives with her father in Florida. Her son lived with her and Chloe in Maryland until he graduated from high school in June 2015. Mother was born in Ohio and her parents and other extended family continue to live there.

When Chloe was nearly a month old, Mother filed a complaint for custody in the circuit court seeking sole legal and physical custody. At that time, Mother was living with Chloe in Silver Spring. Father, who was living in Laurel, counter-claimed, seeking joint legal and joint physical custody.

Meanwhile, in a separate case, the Montgomery County Office of Child Support Enforcement ("MCOESE") filed, on behalf of Mother, a complaint to establish paternity and for child support against Father ("Child Support Case"). By orders entered on

January 10, 2012, Father’s paternity was established, and he was directed to pay \$200 per month in child support.

In the custody case, following a contested hearing on April 2, 2012, the court entered a custody order (“2012 Custody Order”). The parties were granted joint legal custody and, by agreement, Mother was granted primary physical custody. The order established a graduated visitation schedule for Father, beginning with short supervised visits at the Wheaton Mall and at a local McDonald’s; followed by unsupervised mid-week visits in a public place; and culminating in overnight visits every weekend from 6 p.m. on Friday until noon on Saturday, in addition to Monday and Wednesday night visits from 6 p.m. until 8 p.m.

In June 2012, Father moved to modify visitation. He alleged that Chloe slept through most of his midweek visitation periods and that he desired additional weekend time with his daughter to permit her to spend time with him, his new wife, and his extended family.¹

On January 2, 2013, the parties appeared before a family law magistrate for a contested hearing. They placed a partial agreement on the record, agreeing that Father’s midweek access periods would be eliminated in favor of alternate weekend access from

¹ Mother counter-claimed for a modification of visitation and custody, alleging that Father refused to communicate with her about Chloe and that she (Chloe) was not adjusting well to Father “being in her life.” She asked the court to award her sole legal custody, to eliminate the mid-week visitation, and to modify Father’s weekend access to grant him an additional four hours on Saturdays. Her counterclaim later was dismissed, with prejudice, because it was “improperly pled.”

Friday, when Father picked Chloe up at daycare, until Sunday at 6 p.m. The magistrate recommended a shared holiday schedule. Neither party filed exceptions, and the circuit court adopted the magistrate's recommendations by order entered February 4, 2013 ("2013 Custody Order").² The order directed that if either party planned to travel with Chloe during their access period, they were required to give the other party notice 48 hours in advance of their travel itinerary, a phone number where they could be reached, and the mode of travel.

More than two years later, on May 4, 2015, Mother sent Father an email notifying him that she would be traveling to Ohio with Chloe over Mother's Day weekend, departing Saturday, May 9, 2015, and returning Wednesday, May 13, 2015. Unbeknownst to Father, Mother had applied to her employer for a transfer to the Ohio satellite office. Her trip over Mother's Day weekend was for the purpose of finding housing for her and Chloe.

On May 15, 2015, two days after her return to Maryland, Mother sent Father an email with the subject line "Relocating." Mother stated in the email that "[o]n June 13, 2015, Chloe will have a new address that is listed below" and provided an address in North Canton, Ohio.

² The parties and the circuit court treated the 2012 Custody Order as the prevailing custody order because the 2013 Custody Order modified visitation only and did not otherwise incorporate the custody provisions from the earlier order. We shall refer to the 2013 Custody Order as the prevailing order, but all references to that order should be deemed to incorporate the custody provisions of the 2012 Custody Order.

Father did not respond to that email until May 28, 2015. (He did exchange emails with Mother about other matters in the interim, however.) He responded that he was “confused” as to how Mother could relocate to Ohio when he had alternate weekend visitation with Chloe. He asked her to explain how that was “going to work if [Mother and Chloe] [were] in Ohio?” He further noted that Mother was required to discuss major life changes for Chloe with him because they shared legal custody.

Mother responded that same day that she had “received [his] response.” She did not answer his questions. Father replied the next day asking Mother to answer his questions. Mother responded that she was “not comfortable providing [him] legal advice.”

On June 2, 2015, Father filed an *ex parte* emergency motion to enjoin Mother from moving Chloe to Ohio. The court held an emergency hearing that same day. Father was present with counsel, and Mother appeared and represented herself.

Father testified that Mother had not discussed her planned move with him at all prior to her May 15, 2015 email communication. He did not immediately respond to Mother’s email because he wanted to seek legal advice first. After he did respond, Mother refused to discuss the situation further. He testified that he and Chloe have a great relationship; that he was living with his wife and his 7-year-old daughter; that Chloe and her half sister were very close; and that he wanted to ensure that he would continue to see Chloe regularly. He had not filed a motion to modify custody or visitation at that

time and stated that he did not wish to change the schedule of visitation, only to ensure that he received access to his daughter.

Mother testified that she had applied for a job in North Canton, Ohio in April 2015; had been offered and accepted the job on May 13, 2015; had notified Father on May 15, 2015; and was scheduled to start on June 17, 2015. She acknowledged that she had not told Father that she planned to apply for a job in Ohio and that she had not discussed the relocation with him prior to accepting the job. She explained that she and Father have a history of poor communication and that she does not like arguing with him over email.

Father's counsel argued in closing that Mother had violated the joint legal custody provision of the 2013 Custody Order by making the unilateral decision to relocate Chloe to Ohio without first discussing the change with Father and asked the court to temporarily enjoin Mother from moving Chloe out of state. Mother countered that because the 2013 Custody Order granted her primary physical custody and did not preclude her from relocating with Chloe, she was within her rights to relocate with her daughter for employment reasons. She asked the court to deny Father's motion and permit her to file a motion to modify custody and visitation so a modified access schedule could be ordered that would accommodate her relocation.

The court ruled from the bench that because there was no motion to modify custody or visitation pending before the court, it was being asked to grant injunctive relief to maintain the status quo under the 2013 Custody Order. The court found that

Father had shown his entitlement to injunctive relief because Mother’s relocation would result in irreparable harm to his legal custody rights as Mother would be selecting a new school, home, doctor, church, and daycare for Chloe in Ohio, and would likely deprive him of his court ordered alternate weekend access to Chloe. The court emphasized that Mother had offered no plan for maintaining Father’s access rights following her relocation. The court enjoined Mother from relocating with Chloe to Ohio. It directed that if Mother chose to relocate to Ohio as planned, she make arrangements for Chloe to remain in Maryland unless and until the 2013 Custody Order were modified.

Later that same day, Mother filed a motion to modify custody and visitation. She alleged that Father and his older daughter were emotionally abusive to Chloe during the alternate weekend access periods. That evening, Mother emailed Father stating that she was “scheduled to relocate shortly” and asking to “discuss the daycare, doctor and church that Chloe will be attending as these things are subject to change.” Father responded that Mother was not permitted to relocate Chloe.

On June 9, 2015, the court entered an order granting Father’s petition for temporary injunctive relief and “enjoin[ing] and requir[ing Mother] to abide by the [2013 Custody Order]” (“2015 Temporary Injunction”).³

Six days later, on June 15, 2015, Father filed another *ex parte* petition for injunctive relief and an emergency motion to modify custody and visitation. He alleged

³ Mother noted an appeal from that order, but it was later dismissed by this Court for failure to file a civil information report.

that Mother had relocated to Ohio with Chloe in violation of the 2015 Temporary Injunction.

The court held an emergency hearing the next day. Father appeared with counsel and Mother participated by telephone.⁴ She was not represented by counsel. The court questioned Mother. She acknowledged that she had moved with Chloe to Ohio. She explained that she did not have anyone to leave Chloe with in Maryland who she (Chloe) would be “comfortable with being absent and from my presence and being in that other person’s presence.” She further stated that Chloe did not want to visit with Father because he and Father’s older daughter were being “mean to her.” In light of Chloe’s resistance to alternate weekend visits, Mother did not feel comfortable leaving Chloe in Father’s custody when she relocated to Ohio.

The court asked Mother if she was planning to bring Chloe back to Maryland by 6 p.m. on Friday for Father’s scheduled weekend visitation period. She replied that she was not because she had to work until 5 p.m., and Chloe would be in preschool during the day. The court advised Mother that it would be entering an order requiring that Chloe be returned to Maryland on Friday and that if Mother did not bring Chloe back voluntarily, the police would be authorized to remove Chloe from her custody and return her to Maryland. Mother responded that she would not voluntarily turn Chloe over to Father

⁴ The presiding judge’s staff contacted Mother by telephone 20 minutes before the hearing, sent her a copy of Father’s motion, and arranged for her to participate by telephone.

because she did not want her daughter to think she was “in agreement” with this change in custody.

The court issued an order that same day granting Father sole legal and physical custody of Chloe; directing Mother to return Chloe to Father “forthwith”; and authorizing the police to “use all reasonable and necessary force to return [Chloe] to [Father]” in accordance with the order. The order was entered on June 22, 2015 (“2015 Custody Order”).

Meanwhile, on Saturday, June 20, 2015, Mother relinquished Chloe at a police station in Ohio. Father had driven to Ohio, and he took custody of Chloe. They returned to Maryland, where Chloe began living with Father and his wife.

On June 26, 2015, in the Child Support Case, Father entered into a consent order with MCOCSSE whereby his current child support obligation was terminated, and he was ordered to pay \$200 per month until he paid off an arrearage balance of \$2,787.33.

Also on June 26, 2015, Mother, now represented by counsel, moved to alter or amend the 2015 Custody Order. Her motion was denied by order entered on July 16, 2015, and she did not note an appeal from that order.

On August 11, 2015, the court appointed a best interests attorney (“BIA”) to represent Chloe.

On July 8, 2015, Mother filed an amended complaint for modification of custody and visitation. She alleged that Chloe had complained that she (Chloe) was being “mentally and physically abus[ed]” in Father’s home; that Father refused to allow Mother

any access to Chloe; that Chloe “expressed a strong desire to leave [Father]’s home and to reside with [Mother]; and that Chloe wanted to spend more time with her “maternal siblings.” She asked the court to order the Montgomery County Department of Social Services and the MCOCSSE to investigate Chloe’s living conditions; to award her sole legal and physical custody; and to order Father to pay child support.

Father moved to dismiss Mother’s amended complaint, arguing, *inter alia*, that she had failed to state a claim because she had not alleged facts showing a material change in circumstances since the entry of the 2015 Custody Order. His motion to dismiss was denied by order entered on August 18, 2015.

Before then, on July 23, 2015, Father filed a counter-complaint to modify child support. He alleged that because he had been awarded sole legal and physical custody pursuant to the 2015 Custody Order, Mother should be ordered to pay child support.

On November 23, 2015, the parties appeared before a family magistrate for a hearing on Mother’s complaint to modify custody and visitation and on Father’s counter-complaint to modify child support. Chloe was then 4 years old.

As a threshold matter, the magistrate dismissed Father’s counter-complaint to modify child support, without prejudice, ruling that because there was a separate child support case that had not been consolidated with the custody case, and Father had not filed a motion to modify in that case, the issue of child support was not properly before the court.

In her case, Mother testified and called three witnesses: Valerie and John Robert West, III, both friends from the church Mother had attended for many years in Maryland; and Maxine Clark, a co-worker and close friend. Mother testified about her close relationship with Chloe. They liked to cook together, to go to church, to read, to watch shows, and to spend time with each other. Mother characterized her relationship with Father as “[s]trained,” noting that they had communicated solely by email for years. According to Mother, when Father learned that she was pregnant with Chloe, he was “angry.” When Mother went into labor, she notified Father, but he did not come to the hospital. He visited Chloe the day after Mother was released from the hospital and, upon seeing her, asked for a paternity test.

Mother testified that the 2013 Custody Order, which increased Father’s total access time with Chloe, but decreased the regularity of the access periods, was put in place because Father had requested the change.⁵ During the more than two years after the entry of that order, Father only had Chloe in his care for 2 days out of every 14-day block (plus holidays). When Chloe was in Mother’s custody, Father did not contact Mother or seek to have any contact with Chloe by phone or Skype. He did not “seem interested in having more contact with [Chloe],” according to Mother. Father’s mother

⁵ Under the 2012 Custody Order, Father had Chloe in his care 18 hours each week or 36 hours in every two-week block, including one overnight. Under the 2013 Custody Order, Father had Chloe in his care for 48 hours in every two-week block, including two overnights.

had reached out to Mother occasionally, seeking to take Chloe on family reunion trips, but because Mother did not know Father's mother, she declined those requests.

It had always been Mother's intention to move back to Ohio to be closer to her parents after her son graduated from high school. She liked the "slower pace" of life there and thought she could be "a better parent to Chloe" in Ohio. She noted that the cost of living in the D.C. metro area was high and that traffic increased her commute times considerably. Her relocation was not intended to "take away [Father's] time [with] Chloe." She had intended to abide by the visitation schedule in the 2013 Custody Order after she moved to Ohio. Under its terms, every other weekend Father would pick Chloe up at her daycare on Friday and then return her to Mother at a McDonald's on Old Columbia Pike in Maryland at 6 p.m. on Sunday. In Mother's view, once she relocated, Father would be responsible for driving to Ohio every other Friday to pick Chloe up and she would be responsible for driving to Maryland every other Sunday to receive Chloe and take her back to Ohio. She also had planned to move to modify visitation, however, to consolidate Father's access to Chloe over the summer and school breaks so they would not have to travel so much.

Mother explained that she believed that the 2015 Temporary Injunction prohibiting her from moving Chloe to Ohio would remain in effect only until she filed a request to modify custody and visitation, which she did that same day. She thought that having filed that request, she was free to relocate with Chloe and await a hearing on her motion to modify.

In the five months since the entry of the 2015 Custody Order, Father had limited Mother's access to Chloe to three Skype calls per week, lasting approximately 15-20 minutes each. Father supervised the Skype sessions and, according to Mother, often cut off the conversation prematurely. Father also had prohibited Mother from initiating the Skype sessions, threatening to eliminate all Skype access if she continued to call him, even if they had a call scheduled and Father had initiated a Skype call as planned.

Mother had seen Chloe in person just one time during those five months, on November 1, 2015. The BIA had arranged that meeting so she could observe Chloe and Mother together. The meeting took place at the home of Ms. Martin, who as mentioned was Mother's friend and coworker. In addition to Mother, Ms. Martin, the BIA, and Chloe, a private investigator employed by Father was present (at Father's request) to ensure that Mother did not attempt to flee with Chloe. Chloe was overjoyed to see Mother and became very upset when the meeting came to an end, throwing a tantrum and trying to prevent Mother from putting on her shoes and socks.

Mother told the magistrate that, “[i]deally, [Chloe] would live with [Mother in Ohio] and spend . . . maybe two months out of the summer, consecutively, with [Father], so that she could maintain her relationship with him.” That schedule would be preferable because it would limit the parties' need to travel. Mother also was willing to share holidays with Father. She was agreeable to meeting Father halfway between Ohio and Maryland to exchange Chloe for visits. Mother asked the court to award the parties joint

legal custody, but to grant her tiebreaking authority so they would not end up in court every time they disagreed.

In Ohio, Mother planned to enroll Chloe at the Faith Friends preschool for the remainder of 2015/2016 and then in kindergarten at the local zoned public school in September 2016. Mother also planned to enroll Chloe in dance class, a children's choir at her church, and to sign her up for girl scouts once she began elementary school.

On cross-examination, Mother was asked about her allegations that Father was emotionally abusive to Chloe. Mother responded that in December 2014, when Chloe was 3 and a half, she had stopped wanting to go to Father's house because she said that Father and his older daughter were "mean" to her. Mother reported this to Father in an email dated December 6, 2014, which was introduced into evidence. Father never responded to that email.

Mother's character witnesses testified that she is a doting, involved, and wonderful mother. They did not have any contact with Father and could not speak to his relationship with Chloe.

Mother rested her case at the conclusion of the first hearing day. The magistrate continued the hearing until February 8, 2016. (The continued hearing date was subsequently postponed to May 10, 2016.) The magistrate advised the parties that she intended to recommend the entry of an "interim immediate order" granting Mother access to Chloe pending the resolution of the hearing. The magistrate found that "extraordinary circumstances exist[ed]" justifying that relief because Mother had had next to no contact

with Chloe for more than five months. The magistrate recommended that Mother have access to Chloe in Maryland beginning that day (Monday, November 23, 2015) at 7:30 p.m. and continuing through Thanksgiving day (Thursday November 26, 2015) at 6 p.m., provided that Mother could arrange local accommodations. Thereafter, Mother would have access every other weekend from Thursday at 8 p.m. until Sunday at 8 p.m., with exchanges to take place at an agreed upon location halfway between the parties' homes. Mother also would have access from December 20, 2015, through Christmas Day at noon. Finally, the magistrate recommended that Mother be permitted three "unmonitored" Skype sessions per week.

The magistrate's recommended interim order was signed by a judge that same day and was entered on December 7, 2015 ("November 2015 Interim Order").

Meanwhile, on December 3, 2015, Father filed exceptions and requested a hearing. By order entered on February 12, 2016, the court denied Father's exceptions "as premature there being no final decision or recommendation from the Magistrate."

On March 3, 2016, the court entered an order dismissing, without prejudice, Father's counter-complaint to modify child support. Father moved for reconsideration of that order. His motion was denied by order entered on April 15, 2016.

On May 4, 2016, six days before the continuation of the magistrate's hearing, Father filed a motion for leave to refile and amend his counter-complaint for modification of child support and a motion to shorten time. Mother and the BIA opposed the motion. On May 9, 2016, the court held a hearing and denied Father's motion for leave to amend.

He noted an appeal from the orders dismissing his counter-complaint and denying him leave to amend. We shall discuss the rulings relative to child support in more detail, *infra*.

On May 10, 2016, the parties appeared before the magistrate, and Father put on his case. He testified, recalled Mother, and called two witnesses: his mother, Lorrie Foreman, and his wife, Carmella Foreman.

Father testified that he and Chloe had a very close relationship and that she was very close to his older daughter as well. Since Chloe had moved in with him and his wife in June 2015, he had “stepped [his] role up as far as being in a part of her life.” Under the 2013 Custody Order, Father had not had the opportunity to spend a lot of time with Chloe, and he was enjoying the chance to have that time now. Chloe was taking gymnastics classes and playing soccer. Father had enrolled her in preschool at Calvary Baptist School in Glen Burnie. Father testified that he intended to keep Chloe there for elementary school because he wanted her to have a Christian education.

Father testified that he and his wife recently had gone on a week long vacation to California. Chloe had stayed with Carmella’s parents during that vacation. Father had not offered Mother the opportunity to care for Chloe while he was away.

On cross-examination by the BIA, Father was asked what “parenting schedule” he thought would be in Chloe’s best interest if the court were to order that he retain primary physical custody. He responded that “unfortunately [he] didn’t have a concrete answer for that,” but he thought that Chloe should have a “great amount of time with her

mother.” Father also had not “given [any] thought” to a schedule of access for him were Mother to be awarded primary physical custody.

Carmella testified that Father was extremely involved in caring for Chloe and was an active and loving parent. On cross-examination by the BIA, Carmella acknowledged that she often was the one who got Chloe up in the morning, got her dressed, drove her to school, picked her up from school, cooked her dinner, and got her ready for bed. Father also participated in these activities, according to Carmella, but she helped when he was unable to do so.

Father’s mother testified that since Chloe had been in Father’s custody, she and her husband and their extended family had been able to spend much more time with her. She said Chloe was very close with her half-sister and that she loved spending time with her cousins, aunts and uncles, and grandparents.

At the conclusion of the May 10, 2016 hearing, the magistrate directed the parties to file written closing arguments by June 3, 2016. In his closing argument, Father asserted that the court should focus on Mother’s motivation for relocating to Ohio, which he posited was to decrease his access to Chloe, and on the fact that Chloe had lived her whole life in Maryland and had connections there. Father asserted that the status quo was that Chloe was in his custody and that that arrangement should not be disturbed absent evidence that she was not thriving with him.

Mother argued that it was in Chloe’s best interest to be returned to Mother’s primary custody because of their strong bond; because Mother’s job offered her more

flexibility; because Father had not been interested in being the primary custodian until Mother decided to relocate; and because Father relied heavily on his wife to care for Chloe. She asked the court to consolidate Father's access over the summer months, granting him 52 consecutive days. She also asked the court to modify legal custody to grant her tiebreaking authority.

The BIA argued that Mother should be awarded primary physical custody of Chloe because the parties had agreed to that arrangement in April 2012 and in February 2013; Chloe had forged a strong bond with Mother during the first four years of her life and wanted to continue living with Mother; and Father's conduct since the entry of the 2015 Custody Order did not reflect a genuine desire on his part to maintain Chloe's relationship with Mother. The BIA recommended Chloe spend the majority of the summer with Father, in addition to certain long holiday weekends and rotating holidays.

On June 23, 2016, the magistrate held a hearing and announced her recommendations. As a threshold matter, the magistrate determined that the 2015 Custody Order was an "interim order [entered] . . . on an emergency basis." The court found that the June 16, 2015 hearing that resulted in that order was not a "full and complete hearing"; Mother had notice of the hearing just 20 minutes before it was held; Mother was not represented by counsel at that time and participated only by telephone; and while the court did "take some testimony and evidence, it was not a full and complete adversarial process." Thus, the magistrate treated the 2013 Custody Order as the extant

order and found that Mother's relocation to Ohio since the entry of that order was a material change in circumstances.

Turning to the merits, the magistrate made the following relevant findings. Since the entry of the 2015 Custody Order, Father had "undertaken] a course of conduct that . . . was completely contrary to his statement that he wanted both parents in [Chloe's] life." Rather, he had "attempt[ed] to unreasonably limit and interfere and obstruct [Mother]'s access." The magistrate emphasized that Father had decided not to invite Mother to Chloe's birthday party; had made little effort to keep Mother informed about Chloe's academic progress and health; had not given Mother the opportunity to care for Chloe during his April 2016 vacation, instead leaving Chloe with his in-laws; and had insisted on monitoring the Skype communications until ordered to permit Mother to have unsupervised Skype contact with Chloe.

The magistrate found that Mother's decision to relocate was not made for the purpose of disrupting Father's access to Chloe and that Mother had, in fact, intended to maintain Father's alternate weekend visits until she obtained a modification of the 2013 Custody Order. Mother had given Father notice of her intent to relocate and had sought his input on Chloe's schooling and other care in Ohio. The court credited Mother's testimony that she had more familial support in Ohio than she did in Maryland; that it was more cost-effective to live in Ohio; and that she preferred the pace of life there. These all were legitimate reasons to relocate, in the magistrate's view.

The magistrate was “incredulous” that Father was not prepared to suggest a visitation schedule if he were awarded custody or if Mother were awarded custody. The magistrate found that this indicated that Father had a lackadaisical “attitude and approach with respect to Chloe in this matter.”

The magistrate also took note of the parties’ demeanor during the hearing. She found that Mother always was appropriate in her conduct, maintained eye contact, did not react inappropriately during Father’s testimony, and did not interrupt the proceedings in any way. Father, in contrast, was often “leaning back . . . [with] his arm across the back of his chair in a very casual, uninterested approach” and “repeatedly interrupted his attorney to write him notes and to tell him things.” During Mother’s testimony, Father “frequently threw his arms into the air” and “shook his head in a negative way fairly violently on a number of occasions.” Father’s behavior showed a lack of respect for Mother as an individual and as Chloe’s mother.

While both parties were fit, in the magistrate’s view, Chloe’s bond with Mother was more significant and Mother was better able to serve Chloe’s best interests and maintain Chloe’s relationship with both her parents. The magistrate recommended that the 2015 Custody Order be terminated and that the 2013 Custody Order be reinstated. The magistrate further recommended that the 2013 Custody Order be modified to grant Mother tie-breaking authority over legal custody decisions; to eliminate Father’s alternate weekend visitation with Chloe; to grant him summer visitation for two weeks in the remaining two months of the 2016 summer and for all but four weeks of subsequent

summers; and to allow Father Skype contact with Chloe every Wednesday and Saturday at 6:30 p.m. (or more often if requested by Chloe). The magistrate further recommended an alternating holiday access schedule.

On motion of the BIA, the magistrate recommended that the court enter an “Immediate Custody and Access Order” adopting these recommendations so Chloe would not be in “limbo” until after an exceptions hearing could be held and a final order issued. Father opposed that recommendation and the matter was set in for a hearing before a judge on July 1, 2016. The court heard argument and declined to enter an immediate custody and access order.⁶ Thus, the parties continued to operate under the terms of the 2015 Custody Order and the November 2015 Interim Order.

On July 5, 2016, Father filed exceptions to the magistrate’s oral findings and recommendations. He challenged the magistrate’s determination that the 2015 Custody Order was not a final and binding child custody order and, as such, that Mother did not need to show a material change in circumstances since the June 16, 2015 hearing. He also excepted to what he characterized as the magistrate’s “harsh[] bias” against him. He argued that the magistrate clearly erred in finding that he had denied Mother access to Chloe on her birthday (noting an 11-minute Skype call that day) and that he had denied

⁶ At that hearing, the presiding judge ruled that the 2015 Custody Order was not an emergency custody order and was a final custody order. Because Mother did not note an appeal from that order, it was the binding custody determination at the time of the modification hearing and would remain in place pending the resolution of Father’s exceptions to the magistrate’s recommendations.

Mother access to Chloe (noting that he offered supervised visits). He argued that the magistrate had abused her discretion by crediting Mother's testimony about the reasons for her move to Ohio, arguing that Mother's self-serving testimony was not corroborated and was inconsistent with her prior testimony during the emergency hearings. The magistrate further erred, he argued, by downplaying the bond between Chloe and her paternal half-sister and giving little consideration to how Chloe's move to Ohio would affect that relationship.

The court held a hearing on September 19, 2016, and overruled Father's exceptions.⁷ The court ruled that it did not

make any difference whether you view [the 2015 Custody Order] as an interim order or view it as a final order but [with] respect to an emergency matter. [The judge that presided over the June 16, 2015 hearing] was dealing with a specific incident which was the subject of a motion which was that . . . [Mother] in violation of a court order had absconded with the child to the State of Ohio, and the child should be returned to reestablish basically the status quo, at least as far as [Father] would be concerned, that is if the child would be residing here or in Ohio. And [the court], based on the information presented to include some participation by [Mother] granted that emergency order.

It is clear to the Court, though, that was not and was never intended to be an order that would address the merits of long-term . . . custody arrangements for this child. So the [magistrate] . . . was quite correct in viewing the task for material change of circumstances to go back to the preexisting order.

⁷ Father also had excepted to the magistrate's recommendation that his counter-complaint for child support be dismissed. As discussed, an order dismissing his counter-complaint already had been entered, and Father had noted an appeal from that order. In ruling on Father's exceptions, the court agreed with Father that the magistrate had erred by dismissing his counter-complaint to modify child support, but concluded that it lacked jurisdiction over the matter because of the pending appeal.

On the merits of the custody determination, the court adopted the magistrate's findings that Father was less likely to nurture Chloe's relationship with Mother were he to be awarded primary physical custody and that in light of Chloe's bond with Mother, it was in her best interest to be in Mother's custody. The court ordered that Chloe be returned to Mother on October 1, 2016, noting that this would give the parties a little over ten days to make arrangements and to help Chloe transition between their homes smoothly.

On September 22, 2016, the court entered a "Custody and Access Order" adopting the magistrate's recommendations ("September 2016 Custody Order").

Father noted an appeal on September 27, 2016.

As we shall discuss, *infra*, after the entry of the September 2016 Custody Order, Mother and Father became embroiled in another dispute about when the exchange of custody should occur. That dispute resulted in Father's seeking and being granted a temporary protective order against Mother that included a no contact provision relative to him and Chloe. As a result, Father did not turn Chloe over to Mother on October 1, 2016. Mother sought emergency relief and, following another emergency hearing on October 7, 2016, the court granted Mother's motion and ordered that Chloe be turned over to Mother, that the parties abide by the September 2016 Custody Order, and that Mother be awarded sole legal and physical custody of Chloe. Father noted his third appeal from that order.

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Child Support

Father contends the circuit court erred by dismissing his counter-complaint to modify child support after he was awarded sole legal and physical custody of Chloe on June 22, 2015. We agree.

Father filed his counter-complaint to modify child support on July 23, 2015. He alleged that he had been ordered to pay \$200 per month in child support in the Child Support Case when Chloe was in Mother's primary physical custody; that he had since been awarded sole physical custody of Chloe; and that, by consent order with MCOCSSE, his child support obligation had been terminated. He asked the court to order Mother to pay child support.

On November 23, 2015, the first day of the magistrate's hearing, the magistrate determined that Father's counter-complaint to modify child support was not properly before the court because it should have been filed in the Child Support Case, not in the custody case. Alternatively, the magistrate suggested that Father could have moved to consolidate the Child Support Case with the custody case. The magistrate recommended dismissal of Father's counter-complaint, without prejudice.

On March 3, 2016, the court adopted the magistrate's recommendation and entered an order dismissing Father's counter-complaint to modify child support.

On March 14, 2016, Father moved for reconsideration of the March 3, 2016 order. He alleged that the Child Support Case had since been dismissed on March 2, 2016, because his support obligation had been terminated and he had satisfied his arrearage obligation. He further alleged that counsel for MCOCSSE had advised that it could not file a request for child support against Mother within that case because she was a co-plaintiff, not a defendant.

Father's motion for reconsideration was denied by order entered on April 15, 2016.

On May 4, 2016, Father moved for leave to refile and amend his counter-complaint for child support. That motion also was denied.

On May 12, 2016, Father noted an appeal to this Court.

Father plainly plead facts in his counter-complaint to modify child support showing his entitlement to an award of child support. Father was Chloe's primary custodian under the 2015 Custody Order and was providing for all of her support. The child support order entered against Father in the separate case brought by MCOCSSE on behalf of Mother had been terminated (except for an outstanding arrearage) and did not deprive the court of jurisdiction to order child support within the custody case. The court erred as a matter of law by dismissing Father's counter-complaint and denying his motion for reconsideration.

We shall thus vacate the dismissal order and remand for further proceedings to address the merits of Father's motion. We note that while Chloe is no longer in Father's

primary custody, he still may be entitled to an award of support retroactive to the date of the filing of his counter-complaint (July 23, 2015), for the period of time that Chloe was in his custody. *See* Md. Code (1984, 2012 Repl. Vol.), section 12-104(b) of the Family Law Article (“FL”).

II.

September 2016 Custody Order

In assessing the propriety of a modification of custody or visitation, a circuit court must engage in a two-step process. First, the court determines whether there has been a “material” change in circumstances. *See Wagner v. Wagner*, 109 Md. App. 1, 28 (1996); *McMahon v. Piazza*, 162 Md. App. 588, 594 (2005). “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*, 162 Md. App. at 594. “[A] change [is material if it] may affect the welfare of a child.” *Wagner*, 109 Md. App. at 28. “[T]he circumstances to which change would apply would be *the circumstances known to the trial court when it rendered the prior order.*” *Id.* (emphasis added).

Father contends the “prior order” for purposes of Mother’s complaint to modify custody and visitation was the 2015 Custody Order. Thus, he asserts that the circuit court erred by finding that Mother’s relocation to Ohio, which predated the June 16, 2015 emergency hearing and the entry of that order, was a material change in circumstances justifying a modification of that order.

Mother responds that the court correctly determined that there had been numerous material changes affecting Chloe's best interest since the last on-the-merits adjudications, in 2013 and 2012, and that the court did not err or abuse its discretion by modifying custody. We agree with Mother.

In ruling on Father's exceptions, the court determined that the June 16, 2015 emergency hearing was not a full adjudication on the merits but was an abbreviated emergency proceeding to address Mother's relocation of Chloe to Ohio in violation of the 2015 Temporary Injunction. The record amply supports that conclusion. The June 16, 2015 hearing lasted less than 30 minutes (starting at 11:03 a.m. and ending at 11:32 a.m.). Mother was notified of the hearing approximately 20 minutes before it began. She participated by telephone from Ohio. She was not sworn in during the hearing. The presiding judge questioned Mother for approximately 10-15 minutes solely about her decision to relocate and if (and how) she planned to maintain Father's alternate weekend access from Ohio. Father's counsel was not given an opportunity to question Mother. Mother was not given the opportunity to call any witnesses. Father did not speak, call any witnesses, or present any evidence at the hearing. The court was not presented with evidence bearing on the best interest factors and did not make an assessment of those factors in deciding to award Father sole legal and physical custody. The court's ruling plainly was limited to ensuring that Chloe remained in Maryland pending a merits hearing on Mother's motion to modify custody and visitation. Because Mother was by

then living in Ohio, the only way to accomplish that was to order that Chloe live with Father in the interim.

Mother's relocation was a material change in circumstances since the prior adjudications on the merits, in 2012 and 2013, and one that implicated Chloe's best interests. Before June 2015, Chloe had lived primarily with Mother for her entire life. Upon Mother's moving more than 500 miles away, however, the visitation arrangement that was in place would be untenable.

Even if we were to agree with Father that the 2015 Custody Order was the prior final adjudication and that Mother had to prove the existence of a material change since that date (which we do not), we still would perceive no error. The magistrate found that since Father had been awarded sole legal and physical custody of Chloe, he had "attempt[ed] to unreasonably limit and interfere and obstruct [Mother]'s access" to her. This also was a material change affecting Chloe's best interests that justified full adjudication on the merits.

The magistrate's findings, all of which were adopted by the court and none of which are challenged for clear error in the instant appeal, amply supported the court's ultimate decision to restore primary physical custody to Mother; to modify legal custody to grant Mother tie-breaking authority; and to modify Father's access schedule to consolidate his access periods over Chloe's summer vacation and other school holidays.

III.

October 12, 2016 Emergency Custody Order

As discussed, when the court ruled on Father's exceptions to the magistrate's recommendations, it stated that the parties should exchange custody on October 1, 2016. Nevertheless, after the entry of the 2016 Custody Order, Mother emailed Father to advise him that she planned to pick up Chloe for her alternate weekend visit, as provided for under the November 2015 Interim Order, on Thursday, September 29, 2016, at the exchange point in Pennsylvania. Father responded by email that the November 2015 Interim Order had terminated when the final custody order was entered and, in any event, it was clear from the judge's oral ruling that Chloe was to return to Mother's custody on Saturday, October 1, 2016, not on Thursday, September 29, 2016. Father's attorney notified Mother's attorney that he (Father) would not be bringing Chloe to Mother until October 1, 2016.

On Thursday, September 29, 2016, Mother drove to the exchange point in Pennsylvania. When Father did not arrive at the exchange point, Mother called the local police, who advised that they could not assist her. She then drove to Maryland, contacted the police, and went to Father's house with a police officer, arriving after midnight (on September 30, 2016). Father called his attorney, who contacted the police and advised them of the status of the custody case. The police determined that they had no authority to remove Chloe and left.

Later that morning, Father filed a petition for protection from abuse on behalf of himself and Chloe in the District Court of Maryland for Anne Arundel County. He alleged that Mother had come to his home after midnight to try to take Chloe, banged on

his door, and engaged in “stalking and trespassing.” He further alleged that he was supposed to meet Mother on Saturday, October 1, 2016, at the exchange point in Pennsylvania, but that as a result of Mother’s conduct, he was “greatly concerned” about whether that “exchange [could] be safely accomplished.” Father was granted a temporary protective order that same day that directed that Mother have no contact with “the Protected Parties,” who were elsewhere defined in the order to be Father and Chloe. A final protective order hearing was scheduled for October 11, 2016, at 8:45 a.m.

In light of the no contact order, Father refused to turn Chloe over to Mother on October 1, 2016.

On October 5, 2016, Mother filed an *ex parte* emergency motion for immediate child custody requesting enforcement of the September 2016 Custody Order or, in the alternative, that she be granted sole legal and physical custody of Chloe.⁸ An emergency hearing was held on October 7, 2016.⁹ Present at the hearing were Mother and her attorney; Father’s attorney; and the BIA.¹⁰

Mother’s attorney argued that Father’s filing of the petition for a protective order was an attempt to interfere with Mother’s access rights under the September 2016

⁸ Mother also filed a petition for constructive civil contempt, which she later withdrew.

⁹ The court had convened a hearing the prior day, but neither Father nor his counsel could appear. The court continued the matter until the following day to allow Father’s attorney to be present.

¹⁰ Father’s counsel did not explain why Father could not be present at the hearing that day.

Custody Order and that the court should award Mother “immediate custody [of Chloe] pursuant to the previous custody order with the time . . . starting from now and going forward.” In response to questions by the court, Mother clarified that she was referring to the September 2016 Custody Order.

Father’s counsel took the position that Mother had attempted to force an early exchange of custody; that when Father reasonably refused, she had come to Father’s home and banged on his door for an extended period of time; and that Father had, on advice of counsel, sought a protective order as a result. He further argued that Father could not turn Chloe over to Mother because the temporary protective order barred contact between Mother and Chloe.

The BIA argued that Chloe should not be punished because Mother made a mistake by going to Father’s house a day in advance of the exchange date and that the parties remained bound by the September 2016 Custody Order because the temporary protective order did not award custody of Chloe to Father.

The court ruled that the November 2015 Interim Order had terminated upon the entry of the September 22, 2016 Custody Order; therefore, Mother should not have attempted to exchange Chloe on Thursday, September 29, 2016, or Friday, September 30, 2016. The court further found that Father’s refusal to return Chloe to Mother on October 1, 2016, and thereafter amounted to an emergency. The court granted Mother’s petition and ordered that Chloe be turned over to her that night at 6 p.m., at a hotel in Columbia,

Maryland where Mother was staying. The court specified that its order for that exchange to take place superseded the no contact provisions of the temporary protective order.

The court modified by interlineation a proposed order attached to Mother’s motion and signed it that same day. It was entered five days later. That order provides, in pertinent part:

ORDERED, that [Mother]’s request for immediate sole legal and physical custody of the minor child . . . is hereby *granted**;^[11]

ORDERED, that [Mother]’s request to enforce the Child Custody and Access Order is hereby GRANTED;

Ordered, that the child shall be delivered at 6pm on October 7, 2016 at the Springhill Suites (front desk) located at 7055 Minstrel Way, Columbia, Maryland and it is

Further Ordered, that the Temporary Protective Order entered [by the District Court] as to no contact between Chloe . . . and [Mother] is superseded and furthermore that [Father] shall have contact with [Mother] for the limited purpose of exchanging Chloe . . . as aforesaid superseding the no contact provision of the Temporary Protective Order as aforesaid.

The underlined portions of the order were blanks left by Mother in her proposed order. The italicized portions of the order were handwritten by the court. (“October 2016 Emergency Custody Order.”)

Father contends he was deprived of due process at the October 7, 2016 hearing because, although he had notice of the hearing, he did not have notice that the hearing would be a “final custody modification hearing” that could result in an order granting

¹¹ The asterisk was added by the court, but there is no corresponding asterisk elsewhere on the order.

Mother sole legal and physical custody of Chloe. He asserts that the argument of counsel for Mother and the BIA at the hearing, coupled with the court's remarks, did not reflect that any party was asking for, or that the court was contemplating anything other than, enforcement of the September 2016 Custody Order.

Mother responds that because she sought an award of sole legal and physical custody in her emergency motion for immediate child custody, Father was on notice of the subject matter of the hearing. Moreover, because Father's counsel was present and was given an opportunity to present argument, Father was not deprived of his due process rights.

We need not determine whether the October 7, 2016 hearing afforded Father adequate due process because we conclude that the October 2016 Emergency Custody Order is internally inconsistent and must be vacated in part. The order as signed by the court granted Mother's request for "immediate sole legal and physical custody of the minor child" *and* granted Mother's request to "enforce the Child Custody and Access Order," *i.e.*, the September 2016 Custody Order. Clearly, Mother pleaded that relief in the alternative: her request for sole legal and physical custody was not compatible with her request for enforcement of the September 2016 Custody Order, which awarded the parties joint legal custody (with tie-breaking authority for Mother) and awarded primary physical custody to Mother, with extensive summer and holiday access for Father.

The argument of counsel and the court's oral ruling at the October 7, 2016 hearing make plain that the court did not intend to modify the September 2016 Custody Order;

rather, it intended to direct that Chloe be immediately returned to Mother and, going forward, the parties operate under the final custody order entered less than a month earlier (the September 2016 Custody Order). In light of the clear inconsistency in the October 2016 Emergency Custody Order, we shall vacate the portion of that order awarding Mother sole legal and physical custody. Accordingly, the legal and physical custody provisions of the September 2016 Custody Order are operative.

MARCH 3, 2016 ORDER DISMISSING APPELLANT’S COUNTER-COMPLAINT FOR CHILD SUPPORT REVERSED; SEPTEMBER 22, 2016 CUSTODY AND ACCESS ORDER AFFIRMED; PORTION OF OCTOBER 7, 2016 ORDER GRANTING APPELLEE’S REQUEST FOR SOLE LEGAL AND PHYSICAL CUSTODY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEE.