

Circuit Court for Allegany County
Case No.: 01-C-17-045151

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND

No. 0013

September Term, 2023

R.V.

v.

E.B.

Wells, C.J.
Nazarian,
Storm, Harry C.
(Specially Assigned),
JJ.

Opinion by Wells, C.J.

Filed: September 25, 2023

*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.

Appellant, R.V. (“Father”), and appellee, E.B. (“Mother”), are the parents of one minor child, “M”.¹ Father appeals from an order of the Circuit Court for Allegany County denying his motion to modify custody. Father submitted an informal brief raising the following issues, which we have rephrased:

1. Did Father receive ineffective assistance of counsel?
2. Did the circuit court abuse its discretion in finding there was no material change in circumstances?
3. Did the circuit court judge abuse his discretion in failing to recuse himself?

For the reasons set forth below, we affirm.

BACKGROUND

The parties married on September 5, 2014, and have one child together, “M,” born in 2015. On March 17, 2017, Mother filed a Complaint for Custody. On November 22, 2017, the court entered a Custody Consent Order, awarding the parties joint legal and physical custody, and providing that the parties share custody of the child on a “week on/week off basis.” The court entered a Judgment of Absolute Divorce on December 18, 2018, which incorporated, but did not merge, the Custody Consent Order.

On May 5, 2020, Father filed a Petition to Modify Custody in the circuit court, alleging that M had lived with him for the previous six months in Florida. Father also filed a pleading titled “Petition for Domestication and Modification” in the Marion County Circuit Court in Florida, alleging that M had relocated to Florida. Mother filed an Answer

¹ We use the parties’ initials to protect their privacy.

in the Circuit Court for Allegany County, stating that M had traveled between Maryland and Florida, but that her primary residence remained in Maryland. On June 1, 2020, Mother filed a Counter-Petition to Modify Custody, and on June 24, 2020, she filed a contempt petition.

At the hearing on the petitions and counter-petition on September 14, 2020, Father appeared remotely and was represented by counsel. He testified that he had concerns that M had been sexually abused while in Mother’s custody. Father explained that he had not returned M to Mother’s custody because he had tested positive for COVID-19 multiple times. The court took the matter under advisement. Before the court issued a ruling, M’s Best Interest Attorney filed a motion for the court to receive additional evidence and a pleading styled “Emergency Motion to Terminate/Suspend Access”, alleging that Father had contacted the Best Interest Attorney, Mother, and Mother’s counsel, seeking to terminate his parental rights. In response to an investigation into M’s welfare by the Florida Department of Children & Families, Mother traveled to Florida and took physical custody of M. Father subsequently reported to the police and Department of Child Protective Services (“CPS”) that Mother had sexually abused M.

At an emergency hearing on Mother’s motions held on October 26, 2020, Detective Shimer of the Allegany County Combined Criminal Investigation Unit (C3I) testified that the allegations that Mother had sexually abused M had been investigated and found to be unsubstantiated. As a result, no criminal charges were filed against Mother. Both parties testified. After the hearing, the court found Father in contempt for violating the 2017 Custody Consent Order by denying Mother physical access to M for five continuous

months. The court found that there had been a material change in circumstances due to the geographic distance between the parties' homes and M reaching school age. Because the parties had demonstrated a lack of ability to communicate and jointly make parenting decisions for M's welfare, the court found that continuation of joint legal custody was not in M's best interest.

Later, on December 1, 2020, the court issued a written order finding Father in contempt. The court denied Father's motion to modify custody and granted Mother's motion to modify custody. The court awarded Mother sole legal custody and ordered that Father undergo a psychological examination within ninety days and follow any recommendations for treatment. The court further ordered that until Father's examination and treatment were completed, his access to M was to be supervised by Mother or her designee, a minimum of two days per week, and he was prohibited from removing M from Maryland during his access periods.

On April 14, 2022, Father filed a motion asking the court to appoint a psychologist to perform a psychological evaluation, which the court granted. On May 6, 2022, Father filed a petition to modify custody.

At the custody modification hearing on October 31, 2022, Father appeared without counsel and requested that the court strike his previous counsel's appearance. The court granted Father's request and he represented himself. The court reserved on Father's motion for modification to allow the parties an opportunity to address the psychological evaluation prepared by Dr. Jeffrey Lensbower, the court-appointed psychologist.

The custody hearing resumed on February 13, 2023. At the hearing, Mother was

represented by counsel and Father continued to represent himself. Father's daughter, P.V., who was 19 and had been living with him for the previous eight months, testified in Father's case-in-chief. P.V. testified that Father had been good to her, met her needs, and ensured that she attended school during the previous eight months. Father's brother, J.V., testified that he and Father had lived together for approximately four years. He described Father as a very calm and non-violent person, and a fair and wonderful father who does not use drugs.

Dr. Jeffrey Lensbower, an expert in forensic psychology, testified regarding his court-ordered psychological evaluation of Father. Dr. Lensbower interviewed Father, reviewed his psychological history, and discussed the psychological care he was receiving at the Veteran's Affairs ("VA") Medical Center. Father also completed a number of psychological tests under Dr. Lensbower's direction. Dr. Lensbower determined that Father suffered from Post-Traumatic Stress Disorder (PTSD) related to a head injury he had sustained while in the military.

Dr. Lensbower explained that Father suffers from impaired neurological functioning which interferes with his ability to engage in counter-factual reasoning, making it difficult for him to logically analyze his thoughts and behaviors before acting on them. Dr. Lensbower concluded that Father's post-traumatic stress causes him to be triggered by any potential danger he perceives to his daughter, M, which has led to situations where, in an effort to protect her, he has failed to return her at the conclusion of his access periods. As a result of Father's condition, he does not appreciate how his behavior affects M and the emotional damage it causes to her if he does not return her at the appropriate time.

Dr. Lensbower recommended that Father increase his current therapy sessions and, in addition to PTSD therapy, that Father undergo progressive exposure therapy or cognitive processing therapy. He also recommended that Father increase his contact with his current therapist so that he is able to discuss any custody situations and potential outcomes with his therapist before taking action. Dr. Lensbower projected that Father could begin to experience progress within a nine-week period of following his recommendations.

Father did not introduce evidence of his current therapy program. He stated that he had sent documentation to the trial judge by e-mail prior to the hearing, and that he was unaware that parties were not permitted to correspond directly with the trial judge. Father argued that the existing custody order was unfair, and he should not have restrictions on his access to M because he has stable housing, does not use drugs, and has no criminal history. He explained that his failure to return M to Mother after her visit in Florida was attributable to his reliance on bad advice and ineffective assistance of counsel.

At one point during the hearing, Father stated that he “was starting to have concerns about the [c]ourt’s position” and wondering whether he should file “motions along the lines of recusal.” The trial judge gave Father the opportunity to argue recusal, but he declined. Father said he did not want to argue or state on the record his reasons for seeking recusal. Instead, Father stated that he was going to file a motion for recusal with a notice of restricted information the following week.

After reviewing the testimony presented by the parties, the court determined that there had been no material change in circumstances warranting a change in custody. The court pointed out that the existing custody order provided for a re-evaluation of custody

and an assessment of the need for supervised visits following the completion of any treatment recommendations. Though Father indicated that he was receiving treatment through the VA, specifically, the Cohen Center, he did not submit any evidence of his treatment. The court encouraged Father to submit documentation showing that he is complying with the court order and following the recommended treatment program. The court explained that “[t]here is no sunset provision” in the custody order, and Father may seek a re-evaluation of custody upon completion of the treatment recommendations.

Father filed a “Motion to Reconsider and Clarification” on February 15, 2023, stating that “this judge acted with complicity, under CLEAR malice intentionally/knowingly refused his exhibits or to recognize that the father was in fact attending FREQUENT recommended Psychological therapy/receiving treatment, per the [court’s] ... recommendations...”. In support of his motion, Father attached exhibits identified as “Circuit Judge Judicial Correspondence” dated November 10, 2022. The circuit court denied Father’s motion for reconsideration on March 6, 2023.

On March 3, 2023, Father noted an appeal.

DISCUSSION

I.

Ineffective Assistance of Counsel

Father contends that he received ineffective assistance of counsel from attorneys in Florida and Maryland in violation of the Sixth Amendment to the United States Constitution. He asserts that his attorneys had improperly advised him to file motions to

modify custody in both states and advised him against returning M to Maryland due to the COVID-19 pandemic.

Father’s claim of ineffective assistance of counsel is not a basis for relief in this case. The Sixth Amendment and Article 21 of the Maryland Declaration of Rights protect an individual’s right to counsel in criminal, not civil cases. *See* U.S. Const. amend VI; Md. Const. Decl. of Rts. Art. 21; *Blanks v. State*, 228 Md. App. 335, 356 (2016) (explaining that “the Sixth Amendment only applies to criminal prosecutions”); *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 432 (2003) (“Article 21 of the Maryland Declaration of Rights applies solely to criminal prosecutions and provides that every criminal defendant is ‘allowed counsel.’”).

Custody proceedings are civil cases. With certain limited exceptions not applicable here, there is no right to the effective assistance of counsel in civil cases. *See e.g.*, *Abrishamian v. Wash. Med. Grp., P.C.*, 216 Md. App. 386, 407 (2014) (pointing out that, unlike a criminal defendant, a party in a civil case “enjoys no such constitutional right to counsel”). *But see In re Adoption/Guardianship of Chaden M.*, 189 Md. App. 411 (2009), *aff’d on other grounds*, 422 Md. 498 (2011) (recognizing a statutory right to effective assistance of counsel in a termination of parental rights case); *Zetty v. Piatt*, 365 Md. 141, 160 (2001) (holding that an alleged contemnor in a civil contempt proceeding has the right to counsel where incarceration is being sought).

Because Father had no constitutional or statutory right to effective assistance of counsel from the attorneys, he hired to assist him in this case, his contention that he

received ineffective assistance of counsel is not a basis to reverse the trial court’s order denying his request for a modification of custody.

II.

Order Denying Father’s Motion for Modification of Custody

Father contends that the trial court committed “judicial fraud” in denying his motion to modify custody. Specifically, Father argues that trial judge abused his discretion in failing to consider exhibits that he had submitted to the court in advance of the hearing, and instead, the court “made the hearing that day about a study that had absolutely nothing at all to do with [his] custody modification request.”

Maryland Rule 8-131(c) provides:

When an action has been tried without a jury, an appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

We review a trial court’s ultimate decision on custody for abuse of discretion. *Santo v. Santo*, 448 Md. 620, 625 (2016) (citing *Petrini v. Petrini*, 336 Md. 453, 470 (1994)). We will not reverse a trial court’s custody determination unless that decision constituted an abuse of discretion. *Santo*, 448 Md. at 626. A court abuses its discretion “when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court.” *Gizzo v. Gerstman*, 245 Md. App. 168, 201 (2020).

A trial court uses a two-step process in deciding a motion for modification of

custody: “(1) whether there has been a material change in circumstances, and (2) what custody arrangement is in the best interests of the children.” *Santo*, 448 Md. at 639. A material change in circumstances is one that “affects the welfare of the child.” *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012). The moving party has the burden of showing “that there has been 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 this case, the court’s determination that there had been no material change in circumstances was supported by the record. Father introduced evidence showing that he was a caring father and brother with no criminal history. As the court pointed out, however, these facts did not demonstrate a “change” in circumstances. In order to demonstrate that supervised visits were no longer necessary, at a minimum Father was required to show that he had addressed the issues that had given rise to the December 1, 2020 custody order. Specifically, he was required to show that he had followed Dr. Lensbower’s recommendations to obtain targeted therapy for his counter-factual reasoning difficulties. Though Father argues that he provided the court with some records prior to the hearing, he did not introduce those records at the hearing.² Without some evidence of the type of therapy and frequency of the therapy Father had received, the court was unable to

² We note that the trial court properly advised Father at the October 31, 2022 hearing that he would be required to comply with the Maryland Rules of Evidence and Maryland Rules of Procedure in presenting evidence at the modification hearing. *See Dep’t of Labor v. Woodie*, 128 Md. App. 398, 411 (1999) (“It is a well-established principle of Maryland law that *pro se* parties must adhere to procedural rules in the same manner as those represented by counsel.”).

determine whether Father had made progress toward improving his counter-factual reasoning skills or otherwise demonstrated a change in circumstances that warranted a modification to the existing custody order.

III.

Judicial Misconduct

On appeal, Father contends that the trial judge acted dishonestly and abused his authority in failing to recuse himself. Father asserts that he clearly requested on the record that the presiding judge recuse himself because of judicial misconduct. The record does not support Father’s contention. Our review of the record shows this issue was not preserved for review because Father did not squarely put the issue before court for a ruling.

“Ordinarily, an appellate court will not decide any ... issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]” Md. Rule 8-131(a). *See also Joseph v. State*, 190 Md. App. 275, 289 (2010) (“[U]nder Maryland Rule 8-131(a), a party has to object to preserve allegations of judicial bias for review.”) (footnote omitted).

At the hearing, Father said that he had “concerns about the [c]ourt’s position,” but never stated what those concerns were. The presiding judge asked Father if he wanted to say why he felt the judge was biased but Father declined to do so. Instead, he said that he would file a motion to recuse the following week.³ Because father failed to establish a basis

³ After the February 13, 2023 hearing, Father filed a motion to recuse the presiding judge. A different judge denied the motion in a memorandum opinion and order docketed on September 1, 2023. Father’s appeal of that order is pending in this Court in a separate appeal.

to support an allegation of judicial misconduct, we have no ground on which to reverse the court’s decision. *See Acquah v. State*, 113 Md. App. 29, 60–61 (1996) (holding that defendant waived review of trial court’s alleged pattern “of improper conduct” by failing to raise the issue at trial).

**JUDGMENT OF THE CIRCUIT COURT
FOR ALLEGANY COUNTY AFFIRMED.
APPELLANT TO PAY COSTS.**

The correction notice(s) for this opinion(s) can be found here:

<https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0013s23cn.pdf>