UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0137

September Term, 2015

SYBIL BAKER

v.

CURTIS RICKETTS

Eyler, Deborah S.,
Wright,
Nazarian,

JJ.

Opinion by Wright, J.

Filed: November 19, 2015

On February 13, 2015, the Circuit Court for Montgomery County granted a motion filed by appellee, Curtis Ricketts ("Father"), seeking to dismiss the "Motion to Modify 'Consent Modification of Access Order,' and Request for Hearing," filed by appellant, Sybil Baker ("Mother"). The parties are the divorced parents of four children, three of whom have reached the age of majority, except for Megan, who is now 14 years old. Mother asks whether the court abused its discretion in dismissing her motion.[1]

Facts

Father and Mother obtained a divorce judgment in Delaware. On June 26, 2009, Father sought to register and enroll a custody and visitation order from Delaware in Montgomery County. After Mother filed a motion to modify the visitation order in May 2010, a best interest attorney was appointed to represent the children.

On February 7, 2011, a Maryland Consent Modification Access Order ("2011 Access Order") was entered by the parties and signed by a circuit court judge. Pursuant

[1] Mother worded her question as follows:

> "Whether the motions court erred in dismissing Mother's visitation proceeding without an evidentiary hearing, where her motion alleged that the ordered visitation was no longer occurring, and the court interpreted the custody order as providing for an automatic suspension of visitation, where the custody order in question provided that the 'visitation schedule may be modified if a minor child expresses such a desire to the best interest attorney,' and where the record before the motions court contained no indication of any desire expressed to best interest attorney, no position whatsoever by any best interest attorney concerning the child's current position regarding visitation, or any direct evidence one way or the other of the child's current desire regarding visitation, not to mention other current material circumstances."

to this order, Mother was granted face-to-face visitation with her minor children at the time, including Megan, on the first Sunday of every month, from 1:00 p.m. to 6:00 p.m., and telephone access every Tuesday and Thursday evening between 7:00 p.m. and 8:00 p.m. The 2011 Access Order further provided that the parties attend family counseling, and that the schedule may be modified *". . . if a minor child expresses such a desire to the Best Interest Attorney in which case the parties shall defer to the express wishes of the minor child."* (Emphasis added).

In accordance with the 2011 Access Order, the family participated in therapy until June 21, 2011, when the therapist, Dr. Porter G. Shreve, wrote a letter to the circuit court indicating that "'Megan . . . doesn't want to have much contact with her mother because of the conflict she creates.'" It was his opinion that to impose mandatory visitation and counseling would be "unnecessary and . . . arguably counterproductive." Face-to-face visitation between Mother and Megan stopped around March 2013. On March 31, 2014, Mother filed a motion to enforce the 2011 Access Order, stating her desire to re-engage in therapy with Megan and to resume in-person visits with her child.

Disagreeing with Mother's attempt to re-establish visitation, Father filed a motion on May 22, 2014, to dismiss Mother's motion to enforce. Father's motion was granted during a non-evidentiary hearing on August 15, 2014 before Judge David Boynton, who explained that Mother's motion to enforce was more in the nature of an effort to modify custody based upon a material change in circumstances. Judge Boynton stated that, "if [M]other is now at a point where it would be productive to be involved in counseling

with the children, that would be a change of circumstance from the letter of Dr. Shreve three years ago, which said it would be unproductive and unnecessary." Following his ruling granting Father's motion to dismiss, Judge Boynton instructed the clerk to file a docket entry directing Mother to file a motion to modify.

On September 5, 2014, Mother filed a motion to modify "Consent Modification of Access Order" and request for a hearing. Mother's motion asserted that it had been more than a year since Mother had had face-to-face contact with Megan and that she was seeking reconciliation and "reunification," which Mother believed could only be accomplished with the assistance of a therapist. In response, on October 27, 2014, Father again filed a motion to dismiss Mother's request.

On February 13, 2015, a non-evidentiary hearing was held before Judge Sharon V. Burrell. At that time, Judge Burrell denied Mother's motion to modify, effectively granting Father's motion to dismiss. In an oral ruling, Judge Burrell stated:

> There are two basis [sic] listed in the motion to modify for a material change in circumstances. Namely, that the child has not had face to face or any other meaningful contact with her mother in more than a year, and her mother was not earlier, but is now sincerely ready, willing, and able to engage in an appropriate reentrification therapy with her daughter. These are the only two material change[s] in circumstances provided.
>
> The Court finds that this is not sufficient to allege a material change in circumstances. First, there's no material change in circumstances based on the [Mother] being ready, willing, and able to go to therapy.
>
> And with respect to the [M]other not seeing her daughter in more than a year, that's not sufficient material change of circumstance, because the order basically provides that the daughter doesn't have to see her mother [if] she doesn't want to. And although [Mother's] counsel indicates that that's an illegal provision, like it said something that may be litigated at

> another time, but [Mother] was represented by counsel. She and counsel signed this order agreeing to it.
>
> And, with respect to the first part about the [M]other being ready, willing, and able to go to therapy, a material change is something more than a party has changed their mind about abiding by an order. Nothing has changed since this order was entered in to [sic].

Discussion

In accordance with the Supreme Court, Maryland has declared that a parent's interest in raising a child is a fundamental right that cannot be taken away unless clearly justified. "This right is in the nature of a liberty interest that has long been recognized and protected under the state and federal constitutions." *Boswell v. Boswell*, 352 Md. 204, 218 (1998) (citation omitted).

Mother, as a parent, has a fundamental interest in the care and custody of her children. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 394 (4th Cir. 1990). The fundamental liberty interests of parents "provides the constitutional context which looms over any judicial rumination on the question of custody or visitation." *Koshko v. Haining*, 398 Md. 404, 423 (1997) (citations omitted). The right to a hearing regarding this fundamental interest to have access to her child gives the parent an adequate opportunity to defend her case. *See Christhilf v. Annapolis Emergency Hosp. Ass'n, Inc.*, 496 F.2d 174, 178 (4th Cir. 1974) ("[T]he right to a hearing embraces an adequate opportunity to defend.") (Internal quotations omitted). Though the right to be heard is commonly considered a procedural right, the denial "must be determined 'by the

substance of things and not by mere form.'" *Id.* (quoting *Simon v. Craft*, 182 U.S. 427, 436 (1901)).

In *Boswell*, 352 Md. at 220, the Court of Appeals discussed the importance of visitation rights as follows:

> As to visitation, the non-custodial parent has a right to liberal visitation with his or her child "at reasonable times and under reasonable condition," but this right is not absolute. *Myers v. Butler*, 10 Md. App. 315, 317 (1970). As stated in the well-known treatise, 2 WILLIAM T. NELSON, DIVORCE AND ANNULMENT §15.26, at 274-75 (2d ed. 1961), which has been cited in numerous Maryland cases:
>
> > "[A] parent whose child is placed in the custody of another person has a right of access to the child at *reasonable times*. The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child." (Emphasis added and footnotes omitted).
>
> *See also North v. North*, 102 Md. App. 1, 12 (1994); *In re Jessica M.*, 312 Md. 93, 113-14 (1988); *Shapiro v. Shapiro*, 54 Md. App. 477, 482 (1983); *Radford v. Matczuk*, 223 Md. 483, 488 (1960). Not only must access to the children be reasonable, but any limitations placed on visitation must also be reasonable. *North*, 102 Md. App. at 12. In examining the reasonableness of a visitation restriction, courts will look to see if the child is endangered by spending time with the parent: "Visitation rights, however, are not to be denied even to an errant parent unless the best interests of the child would be endangered by such contact." *Roberts v. Roberts*, 35 Md. App. 497, 507 (1977).

Court decisions concerning visitation "generally are within the sound discretion of the trial court, and are not to be disturbed unless there has been a clear abuse of discretion." *In re Billy W.*, 387 Md. 405, 477 (2005) (citations omitted). The trial court is required to consider the best interests of the child, therefore, "visitation may be restricted or even denied when the child's health or welfare is threatened." *Id.* (citations

omitted). A juvenile court order terminating visitation, however, "is subject to modification as circumstances change." *In re Adoption/Guardianship No. 87A262*, 323 Md. 12, 22 (1991). Unless a material change of circumstances is found to exist, the court's inquiry into the child custody or visitation claim ceases. *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). In the context of this case, the term "material relates to a change that may affect the welfare of a child." *Id.* (citing *McCready v. McCready*, 323 Md. 476 (1991)). "If a material change of circumstances is found to exist, then the court, in resolving the custody issue, considers the best *interest* of the child as if it was an original custody proceeding." *Wagner,* 109 Md. App. at 28.

There has been a material change in circumstances "if a court concludes, on sufficient evidence, that an existing provision concerning custody or visitation is no longer in the best interest." *McMahon v. Piazze*, 162 Md. App. 588, 596 (2005).

In this case, we are not provided with the reason for which Mother's visitation has been discontinued. If the reason for the discontinuation of visitation is the wishes of the child, an agreement authorizing such a veto power is without authority. Although Mother originally agreed to the provision and two circuit court judges failed to take cognizance of the inherent problem, when brought to its attention, the trial court could not ignore its responsibility because of the doctrine of *parens patriae*. *See Ellis v. Ellis*, 19 Md. App. 361, 366 (1973); *see also In re Mark M.*, 365 Md. 687, 705 (2001) ("[T]he State of Maryland has an interest in caring for those, such as minors, who cannot care for themselves") (citation omitted). A court, "acting under the State's *parens patriae*

authority, is in the unique position to marshal the applicable facts, assess the situation, and determine the correct means of fulfilling a child's best interests." *In re Najasha B.*, 409 Md. 20, 34 (2009) (citation omitted). "[T]he important public policy it proclaims is broad and certainly applies here, where adults may be jeopardizing the future welfare of their children by signing [agreements] like" the 2011 Access Order. *BJ's Wholesale Club, Inc. v. Rosen*, 435 Md. 714, 740 (2013) (citation omitted).

If visitation terminated because the daughter invoked this provision, the circuit court at a bare minimum should have considered whether to strike the suspect provision or considered it invalid.[2] On the other hand, visitation might have stopped because Mother stopped seeking it, or for some other reason. Either way, the next step should have been to hold an evidentiary hearing so that the court could determine why counseling never took place and why the visitation ended. This would include an inquiry into whether the refusal to allow visitation was based on the wishes of the child, whether the child's best interests going forward would be served by resuming visitation and, if so, whether further therapy or other steps should be required.[3]

[2] During oral argument, Father asserted that the provision would only come into play if there was a request for an increase in the visitation hours. This gloss does not save the provision.

[3] The "placement of the child must reflect the independent judgment of the [court]" based on the child's best interest. *Levitt v. Levitt*, 79 Md. App. 394, 403 (1989). "Our review must then focus on whether the [court] had before [it] sufficient first-level facts supported by credible evidence upon which [it] could make these recommendations." *Id.* Although the "court is not required to speak with the children," *Lemley v. Lemley*, 102 Md. App. 266, 288 (1994) (citation mitted), it should determine *whether the child was truthful in stating her preference* or whether (continued…)

For the foregoing reasons, we reverse the circuit court's judgment dismissing Mother's motion, and we remand so that the court can hold a hearing on the matter.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

"there had been 'a certain amount of influencing.'" *Id.* at 288 n.4. (Emphasis added). This does not give the child the final say.